9-6-2008

McKay v. State Clerk's Record v. 2 Dckt. 34271

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Vol. 2 of 3

Volume II
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

SHANE MCKAY,

Petitioner-Appellant,

-vs-

STATE OF IDAHO,

Respondent.

Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable RENAE J. HOFF, District Judge

Molly Huskey
State Appellate Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703

Attorney for Appellant

Lawrence G. Wasden
Attorney General
Statehouse
Boise, Idaho 83720

Attorney for Respondent

35789

34271

IN THE SUPREME COURT OF THE

STATE OF IDAHO

SHANE MCKAY, Petitioner-Appellant, -vs- STATE OF IDAHO, Respondent.	)	Supreme Court No. 34271

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE RENAE J. HOFF, Presiding

Molly Huskey, State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703

Attorney for Appellant

Lawrence G. Wasden, Attorney General, Statehouse, Boise, Idaho 83720

Attorney for Respondent

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dt

DAVID L. YOUNG
CANYON COUNTY PROSECUTING ATTORNEY
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Caldwell, Idaho 83605

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE MCKAY,

Defendant/Petitioner,

vs.

THE STATE OF IDAHO,

Plaintiff/Respondent.

CASE NO. CV0700728

MOTION FOR SUMMARY DISPOSITION UNDER I.C. §19-4906(c)

COMES NOW, GEARLD L. WOLFF, Deputy Prosecuting Attorney for Respondent State of Idaho, who pursuant to I.C. §19-4906(c) moves the Court for Summary Disposition on the pleadings filed herein as there are no genuine issues of material fact and Respondent is entitled to judgment as a matter of law. The basis of said request is as follows:

1. Counsel filed appropriate proposed jury instructions and made the appropriate legal arguments. See, Exhibits "C", "D" and "E" attached hereto and incorporated herein by this reference.

2. The Courts jury instructions 201A, B, C, D, E, and F are adequate instructions on

the law as it relates to the crime of Felony Vehicular Manslaughter. See, Exhibit "B" attached hereto and incorporated herein by this reference.

3. The Courts instructions 201A is substantially the same as the pattern vehicular manslaughter instruction in I.C.J.I. 709, and actually puts a HIGHER burden on the State than the pattern instruction. Under I.C.J.I. 709, the State's burden is to show that the defendant's conduct "was a significant cause contributing to the death" of Ted Cox.. See, Exhibit "A" attached hereto and incorporated herein by this reference. The Court's instruction required the State to prove that the defendant's conduct was THE CAUSE of the death of Ted Cox. The Court's instruction was, thus, of a benefit to Petitioner as it required a higher burden of proof to be met before the jury could convict. Counsel's argument to the jury focused on that higher burden, as well as upon the instruction on act and intent (201F). Ineffective assistance of counsel can not be predicated upon conduct of counsel that benefitted the Petitioner. As given, Instruction 201A contains an express element as to "causation' which is greater than that required by the statutory language of I.C. §18-4006(3)(b) and I.C.J.I. 709.

4. The Court record and transcripts in CR0321789 support a finding that trial counsel was constitutionally adequate and competent and that Petitioner was afforded a fair trial through counsel's assistance.

5. Petitioner's citation to State v. McNair, 141 Idaho 263, 108 P.3d 410 (Ct.App. 2005) is inappropriate. A charge of Felony Vehicular Manslaughter under I.C. §18-4006(3)(b) does not include a negligence standard, but is premised upon causing someone's death while operating a motor vehicle under the influence of alcohol, i.e. "other culpable behavior". Furthermore, the Court and counsel were both aware of I.C. §18-114 and I.C.J.I. 305 on the "union or operation of act and

intent." See, Instructions of the Court, 201E, and Defendant's Proposed Instructions. The jury was adequately instructed on the element of causation and intent.

Oral argument is requested.

DATED this 25th day of January, 2007.

GEARLD L. WOLFF
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Summary Disposition Under I.C. § 19-4906(c) was mailed to Dennis Benjamin, P.O. Box 2772, Boise, Idaho 83702, *counsel for Petitioner, on or about* this 25th day of January, 2007.

GEARLD L. WOLFF
Deputy Prosecuting Attorney

ICJI 709 VEHICULAR MANSLAUGHTER

INSTRUCTION NO.

In order for the defendant to be guilty of Vehicular Manslaughter, the state must prove each of the following:

1. On or about [date]

2. in the state of Idaho

3. the defendant [name], while operating a motor vehicle committed the unlawful act of [description of misdemeanor or infraction] [driving while under the influence of alcohol]; [and]

[4. the unlawful act was committed with gross negligence; and]

[4][5]. the defendant's operation of the motor vehicle in such unlawful manner was a significant cause contributing to the death of [name of decedent(s)].

You are further instructed that the unlawful act of [insert description of misdemeanor or infraction] [driving while under the influence of alcohol] is committed when all of the following are found to exist:

[Insert elements from statute or other instructions]

If the state has failed to prove any of the above, you must find the defendant not guilty. If you unanimously find that the state has proven each of the above, including each component of the unlawful act of [insert description of misdemeanor or infraction] [driving while under the influence of alcohol] beyond a reasonable doubt, then you must find the defendant guilty of vehicular manslaughter.

Comment

I.C. § 18-4006.

The committee chose to use the term "unlawful act," rather than "crime," in paragraph number 3. An infraction could constitute the offense that gives rise to the vehicular manslaughter charge. Infractions are criminal offenses. *State v. Bennion*, 112 Idaho 32, 730 P.2d 952 (1986).

This first alternative paragraph number 4 should be used only when the defendant is charged under IC § 18-4006(3)(a). See ICJI 342 for definition of "gross negligence."

[Revised July 2005]

Exhibit A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO

Plaintiff,

-vs-

SHANE MCKAY

Defendants.

CASE NO. CR-03-21789-C

INSTRUCTIONS TO THE JURY

B

Exhibit

INSTRUCTION NO. 101

Now that you have been sworn as jurors to try this case, I want to go over with you what will be happening. I will describe how the trial will be conducted and what we will be doing. At the end of the trial, I will give you more detailed guidance on how you are to reach your decision.

Because the state has the burden of proof, it goes first. After the state's opening statement, the defense may make an opening statement, or may wait until the state has presented its case.

The state will offer evidence that it says will support the **charge** against the defendant. The defense may then present evidence, but is not required to do so. If the defense does present evidence, the state may then present rebuttal evidence. This is evidence offered to answer the defense's evidence.

After you have heard all the evidence, I will give you additional instructions on the law. After you have heard the instructions, the state and the defense will each be given time for closing arguments. In their closing arguments, they will summarize the evidence to help you understand how it relates to the law. Just as the opening statements are not evidence, neither are the closing arguments. After the closing arguments, you will leave the courtroom together to make your decision. During your deliberations, you will have with you my instructions, the exhibits admitted into evidence and any notes taken by you in court.

INSTRUCTION NO. 102

This criminal case has been brought by the state of Idaho. I will sometimes refer to the state as the prosecution. The state is represented at this trial by a deputy prosecuting attorney, **Virginia Bond** and **Gearld L. Wolff**. The defendant, **Shane Mckay**, is represented by **Richard L. Harris**. The defendant is charged by the state of Idaho with a violation of law. The charge against the defendant is contained in an **Information**. The clerk shall read the Information and state the defendant's plea.

The Information is simply a description of the charge; it is not evidence.

INSTRUCTION NO. 103

Under our law and system of justice, the defendant is presumed to be innocent. The presumption of innocence means two things.

First, the state has the burden of proving the defendant guilty. The state has that burden throughout the trial. The defendant is never required to prove his or her innocence, nor does the defendant ever have to produce any evidence at all.

Second, the state must prove the alleged crime beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It is the kind of doubt which would make an ordinary person hesitant to act in the most important affairs of his or her own life. If after considering all the evidence you have a reasonable doubt about the defendant's guilt, you must find the defendant not guilty.

INSTRUCTION NO. 104

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider them as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rules of law. At times during the trial, an objection may be made to a question asked a witness, or to a witness' answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might have shown. Similarly, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the trial I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any

problems. Your are not to speculate about any such discussions. They are necessary from time to time and help the trial run more smoothly.

Some of you have probably heard the terms "circumstantial evidence," "direct evidence" and "hearsay evidence." Do not be concerned with these terms. You are to consider all the evidence admitted in this trial.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your role is to think about the testimony of each witness you heard and decide how much you believe of what the witness had to say.

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

INSTRUCTION NO. 105

If during the trial I may say or do anything, which suggests to you that I am inclined to favor the claims or position of any party, you will not permit yourself to be influenced by any such suggestion. I will not express nor intend to express, nor will I intend to intimate, any opinion as to which witnesses are or are not worthy of belief; what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. 106

Do not concern yourself with the subject of penalty or punishment. That subject must not in any way affect your verdict. If you find the defendant guilty, it will be my duty to determine the appropriate penalty or punishment.

INSTRUCTION NO. 107

If you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. You should not let note-taking distract you so that you do not hear other answers by witnesses. When you leave at night, please leave your notes in the jury room.

If you do not take notes, you should rely on your own memory of what was said and not be overly influenced by the notes of other jurors. In addition, you cannot assign to one person the duty of taking notes for all of you.

INSTRUCTION NO. 108

It is important that as jurors and officers of this court you obey the following instructions at any time you leave the jury box, whether it be for recesses of the court during the day or when you leave the courtroom to go home at night.

First, do not talk about this case either among yourselves or with anyone else during the course of the trial. You should keep an open mind throughout the trial and not form or express an opinion about the case. You should only reach your decision after you have heard all the evidence, after you have heard my final instruction and after the final arguments. You may discuss this case with the other members of the jury only after it is submitted to you for your decision. All such discussion should take place in the jury room.

Second, do no let any person talk about this case in your presence. If anyone does talk about it, tell them you are a juror on the case. If they won't stop talking, report that to the bailiff as soon as you are able to do so. You should not tell any of your fellow jurors about what has happened.

Third, during this trial do not talk with any of the parties, their lawyers or any witnesses. By this, I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. In no other way can all parties be assured of the fairness they are entitled to expect from you as jurors.

Fourth, during this trial do not make any investigation of this case or inquiry outside of the courtroom on your own. Do not go any place mentioned in the testimony without an explicit order from me to do so. You must not consult any books, dictionaries, encyclopedias or any other source of information unless I specifically authorize you to do so.

Fifth, do not read about the case in the newspapers. Do not listen to radio or television broadcasts about the trial. You must base your verdict solely on what is presented

in court and not upon any newspaper, radio, television or other account of what may have happened.

INSTRUCTION NO. 201

You have now heard all the evidence in the case. My duty is to instruct you as to the law.

You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. If anyone states a rule or law different from any I tell you, it is my instruction that you must follow.

INSTRUCTION NO. 201A

In order for the defendant to be guilty of Vehicular Manslaughter, as charged in the information, the state must prove each of the following beyond a reasonable doubt:

1. On or about the 5th day of October, 2003,
2. in the state of Idaho, Canyon County,
3. the defendant, Shane McKay, drove or was in actual physical control of
4. a motor vehicle
5. upon a highway, street or bridge or upon public or private property open to the public,
6. while under the influence of alcohol

or

while having an alcohol concentration of 0.08 or more as shown by analysis of defendant's blood,

7. and the defendant's operation of the motor vehicle caused the death of Ted Cox.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty.

INSTRUCTION NO. 201B

The phrase "actual physical control," means being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.

INSTRUCTION NO. 201C

The term "highway" means the same as "street" and includes public roads, alleys, bridges and adjacent sidewalks and rights-of-way.

INSTRUCTION NO. 201D

To prove that someone was under the influence of alcohol, it is not necessary that any particular degree or state of intoxication be shown. The state need only show that the defendant had consumed sufficient alcohol to affect the defendant's ability to drive the motor vehicle.

INSTRUCTION NO. 201E

It is alleged that the crime charged was committed "on or about" a certain date. If you find the crime was committed, the proof need not show that it was committed on that precise date.

INSTRUCTION NO. 201F

In every crime or public offense there must exist a union or joint operation of act and intent.

INSTRUCTION NO. 201G

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were admonished that it could not be considered for any purpose other than the limited purpose for which it was admitted.

Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

INSTRUCTION NO. 201H

You have heard the testimony of Tina Hoover concerning a statement made by Mike Warren before this trial. The believability of a witness may be challenged by evidence that on some former occasion the witness made a statement that was not consistent with the witness' testimony in this case. Evidence of this kind may be considered by you only for the purpose of deciding whether you believe Mark Warren's testimony. This evidence of an earlier statement has been admitted to help you decide if you believe Mike Warren's testimony. You cannot use these earlier statements as evidence in this case.

INSTRUCTION NO. 2011

A defendant in a criminal trial has a constitutional right not to be compelled to testify. The decision whether to testify is left to the defendant, acting with the advice and assistance of the defendant's lawyer. You must not draw any inference of guilt from the fact that the defendant did not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

INSTRUCTION NO. 206

As members of the jury it is your duty to decide what the facts are and to apply those facts to the law that I have given you. You are to decide the facts from all the evidence presented in the case.

The evidence you are to consider consists of:

1. sworn testimony of witnesses;
2. exhibits which have been admitted into evidence; and
3. any facts to which the parties have stipulated.

Certain things you have heard or seen are not evidence, including:

1. arguments and statements by lawyers. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is included to help you interpret the evidence, but is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, follow your memory;
2. testimony that has been excluded or stricken, or which you have been instructed to disregard;
3. anything you may have seen or heard when the court was not in session.

INSTRUCTION NO. 207

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you, and then you will retire to the jury room for your deliberations.

The arguments and statements of the attorneys are not evidence. If you remember the facts differently from the way the attorneys have stated them, you should base your decision on what you remember.

The attitude and conduct of jurors at the beginning of your deliberations are important. It is rarely productive at the outset for you to make an emphatic expression of your opinion on the case or to state how you intend to vote. When you do that at the beginning, your sense of pride may be aroused, and you may hesitate to change your position even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.

During your deliberations, you each have a right to re-examine your own views and change your opinion. You should only do so if you are convinced by fair and honest discussion that your original opinion was incorrect based upon the evidence the jury saw and heard during the trial and the law as given you in these instructions.

Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual

judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.

INSTRUCTION NO. 208

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

INSTRUCTION NO. 209

The original instructions and the exhibits will be with you in the jury room. They are part of the official court record. For this reason please do not alter them or mark on them in any way.

The instructions are numbered for convenience in referring to specific instructions. There may or may not be a gap in the numbering of the instructions. If there is, you should not concern yourselves about such gap.

INSTRUCTION NO. 211

Upon retiring to the jury room, select one of you as a presiding juror, who will preside over your deliberations. It is that person's duty to see that discussion is orderly; that the issues submitted for your decision are fully and fairly discussed; and that every juror has a chance to express himself or herself upon each question.

In this case, your verdict must be unanimous. When you all arrive at a verdict, the presiding juror will sign it and you will return it into open court.

Your verdict in this case cannot be arrived at by chance, by lot, or by compromise.

If, after considering all of the instructions in their entirety, and after having fully discussed the evidence before you, the jury determines that it is necessary to communicate with me, you may send a note by the bailiff. You are not to reveal to me or anyone else how the jury stands until you have reached a verdict or unless you are instructed by me to do so.

A verdict form suitable to any conclusion you may reach will be submitted to you with these instructions.

DATED This 29th day of Oct., 2003

DISTRICT JUDGE

LODGED
FILED
A.M. 1:50 P.M.
OCT 22 2004
CANYON COUNTY CLERK
S. MAUND, DEPUTY

RICHARD L. HARRIS
Attorney at Law
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Caldwell, Idaho 83606
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ISB No. 1387
Attorney for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

THE STATE OF IDAHO, Plaintiff, vs. SHANE MCKAY, Defendant.	CASE NO. CR-03-21789 DEFENDANT'S PROPOSED JURY INSTRUCTIONS

COMES NOW, the above-named Defendant by and through his attorney and submits their proposed Jury Instructions and Respectfully request this Court to consider said instructions in instructing the jury in this action.

DATED: This 21 day of October, 2004.

RICHARD L. HARRIS

Exhibit C

CERTIFICATE OF SERVICE

I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following this 21 day of October, 2004.

DAVID L. YOUNG
Canyon County Prosecutor
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605

_____ United States Mail

__✓__ Hand Delivered

_____ Facsimile

RICHARD L. HARRIS

Instruction No. _____

In order for the defendant to be guilty of Vehicular Manslaughter, the state must prove each of the following:

1. On or about the 5th day of October, 2003;
2. In Canyon County, State of Idaho;
3. The Defendant, Shane McKay, while operating a motor vehicle committed the unlawful act of driving while under the influence of alcohol; and
4. the operation of the motor vehicle in an unlawful manner caused the death of Theodore Cox.

You are further instructed that the unlawful act of driving while under the influence of alcohol is committed when all of the following are found to exist:

1. That on or about October 5, 2003;
2. In Canyon County, State of Idaho;
3. The defendant, Shane McKay, was driving, or in actual physical control of a motor vehicle;
4. Upon a highway, street or bridge, or upon public or private property open to the public;
5. While under the influence of alcohol and/or who has an alcohol concentration of .08 or more as shown by an analysis of his blood, urine or breath.

If you find from the evidence the State has failed to prove any of the above, then you must find the Defendant not guilty.

If you unanimously find that the State has proven each of the above, beyond a reasonable doubt, then you must find the Defendant guilty of vehicular manslaughter.

ICJI 709

Covered

Instruction No. _____

Criminal negligence is such negligence as amounts to a wanton, flagrant or reckless disregard of consequences or willful indifference of the safety and rights of others.

ICJI 341

Denied

Instruction No. _____

In every crime or public offense there must exist a union or operation of act and intent or criminal negligence.

I.C. 18-114

ICJI 305

M
Given

Instruction No. _____

A Defendant in a criminal action is presumed to be innocent. This presumption places upon the state the burden of proving the defendant guilty beyond a reasonable doubt. Thus, a Defendant begins the trial with a clean slate with no evidence against him and the state must prove each element of the crime charged beyond a reasonable doubt. The Defendant is never required to prove his innocence, nor does the Defendant ever have to produce any evidence at all. Therefore, if after considering all of the evidence and the instructions on the law, you have a reasonable doubt as to the defendant's guilt, you must return a verdict of not guilty.

A reasonable doubt is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

ICJI 103

Covered

Instruction No. _____

You are instructed that if the evidence is susceptible of two reasonable interpretations, one of which points to the Defendant's guilt and the other to his innocence, it is your duty as the jury to adopt that interpretation which points to the Defendant's innocence, and reject the other which points to his guilt.

State v. Holder, 100 Idaho 129, 594 P.2d 639 (1979)
State v, Humphreys, 134 Idaho 657, 8 P.3d 652 (2000)

Held
Overruled

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "It shall be unlawful for any person to drive, or move, on any highway any vehicle which does not contain those parts or is not at all time equipped with the lamps and other requirements in proper condition and adjustment, or which is any manner in violation of the provisions of the Title 49, Chapter 9, Idaho Code."

A violation of the statute is negligence.

IDJI 2.22

Deny

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "Every motorcycle and every motor-driven cycle shall carry at least one reflector either as part of the tail lamps or separately mounted on the vehicle at a height of not less than twenty (20) inches nor more than sixty (60) inches and shall be of a size and characteristic and mounted so as to be visible at night from all distances within three hundred fifty (350) to one hundred (100) feet from the vehicle when directly in front of lawful upper beams of head lamps." [I.C. 49-907]
>
> A violation of the statute is negligence.

IDJI 2.22

Denied

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "Nothin herein shall prohibit the display on any vehicle thirty (3) years or older of tail lamps containing a blue or purple insert lens not to exceed one (1) inch in diameter, provided the tail lamp or lamps otherwise comply with the requirements of I.C. 49-906."

A violation of the statute is negligence.

IDJI 2.22

Denied

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "Every motor vehicle...shall be equipped with at least one (1) tail lamp mounted on the rear, which when lighted as required, shall emit a red light plainly visible from a distance of five hundred (500) feet to the rear, and shall be located at a height of not more than seventy-two (72) inches nor less than twenty (20) inches. [I.C. 49-906]
>
> A violation of the statute is negligence.

IDJI 2.22

Denied

Instruction No. _____

The term "negligence" refers to a lack of that attention to the probable consequences of an act or omission which a prudent person ordinarily would apply to the person's own affairs.

ICJI 341

Denied

Instruction No. _____

In order for the defendant to be guilty of Vehicular Manslaughter, the state must prove each of the following:

1. On or about the 5th day of October, 2003;
2. In Canyon County, State of Idaho;
3. The Defendant, Shane McKay, while operating a motor vehicle committed the unlawful act of driving while under the influence of alcohol; and
4. the operation of the motor vehicle in an unlawful manner caused the death of Theodore Cox.

You are further instructed that the unlawful act of driving while under the influence of alcohol is committed when all of the following are found to exist:

1. That on or about October 5, 2003;
2. In Canyon County, State of Idaho;
3. The defendant, Shane McKay, was driving, or in actual physical control of a motor vehicle;
4. Upon a highway, street or bridge, or upon public or private property open to the public;
5. While under the influence of alcohol and/or who has an alcohol concentration of .08 or more as shown by an analysis of his blood, urine or breath.

If you find from the evidence the State has failed to prove any of the above, then you must find the Defendant not guilty.

If you unanimously find that the State has proven each of the above, beyond a reasonable doubt, then you must find the Defendant guilty of vehicular manslaughter.

Instruction No. _____

Criminal negligence is such negligence as amounts to a wanton, flagrant or reckless disregard of consequences or willful indifference of the safety and rights of others.

Instruction No. _____

In every crime or public offense there must exist a union or operation of act and intent or criminal negligence.

Instruction No. _____

A Defendant in a criminal action is presumed to be innocent. This presumption places upon the state the burden of proving the defendant guilty beyond a reasonable doubt. Thus, a Defendant begins the trial with a clean slate with no evidence against him and the state must prove each element of the crime charged beyond a reasonable doubt. The Defendant is never required to prove his innocence, nor does the Defendant ever have to produce any evidence at all. Therefore, if after considering all of the evidence and the instructions on the law, you have a reasonable doubt as to the defendant's guilt, you must return a verdict of not guilty.

A reasonable doubt is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Instruction No. _____

You are instructed that if the evidence is susceptible of two reasonable interpretations, one of which points to the Defendant's guilt and the other to his innocence, it is your duty as the jury to adopt that interpretation which points to the Defendant's innocence, and reject the other which points to his guilt.

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "It shall be unlawful for any person to drive, or move, on any highway any vehicle which does not contain those parts or is not at all time equipped with the lamps and other requirements in proper condition and adjustment, or which is any manner in violation of the provisions of the Title 49, Chapter 9, Idaho Code."

A violation of the statute is negligence.

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "Every motorcycle and every motor-driven cycle shall carry at least one reflector either as part of the tail lamps or separately mounted on the vehicle at a height of not less than twenty (20) inches nor more than sixty (60) inches and shall be of a size and characteristic and mounted so as to be visible at night from all distances within three hundred fifty (350) to one hundred (100) feet from the vehicle when directly in front of lawful upper beams of head lamps." [I.C. 49-907]

A violation of the statute is negligence.

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "Nothing herein shall prohibit the display on any vehicle thirty (30) years or older of tail lamps containing a blue or purple insert lens not to exceed one (1) inch in diameter, provided the tail lamp or lamps otherwise comply with the requirements of I.C. 49-906."

A violation of the statute is negligence.

IDJI 2.22

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "Every motor vehicle...shall be equipped with at least one (1) tail lamp mounted on the rear, which when lighted as required, shall emit a red light plainly visible from a distance of five hundred (500) feet to the rear, and shall be located at a height of not more than seventy-two (72) inches nor less than twenty (20) inches. [I.C. 49-906]

A violation of the statute is negligence.

Instruction No. _____

The term "negligence" refers to a lack of that attention to the probable consequences of an act or omission which a prudent person ordinarily would apply to the person's own affairs.

Instruction No. _____

There was a certain statute in force in the State of Idaho at the time of the occurrence in question which provided that:

> "Nothing herein shall prohibit the display on any vehicle thirty (30) years or older of tail lamps containing a blue or purple insert lens not to exceed one (1) inch in diameter, provided the tail lamp or lamps otherwise comply with the requirements of I.C. 49-906."

A violation of the statute is negligence.

Instruction No. _____

In order for the defendant to be guilty of Vehicular Manslaughter, the state must prove each of the following:

1. On or about the 5th day of October, 2003;
2. In Canyon County, State of Idaho;
3. The Defendant, Shane McKay, while operating a motor vehicle committed the unlawful act of driving at a speed greater than the posted limit but without gross negligence; and
4. the operation of the motor vehicle in an unlawful manner caused the death of Theodore Cox.

If you find from the evidence the State has failed to prove any of the above, then you must find the Defendant not guilty.

If you unanimously find that the State has proven each of the above, beyond a reasonable doubt, then you must find the Defendant guilty of vehicular manslaughter.

ICJI 709

Δ instruction denied

Instruction No. _____

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If you find from the evidence the State has failed to prove any of the above, then you must find the Defendant not guilty.

If you unanimously find that the State has proven each of the above, beyond a reasonable doubt, then you must find the Defendant guilty of vehicular manslaughter.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO, Plaintiff,
vs.
SHANE McKAY, Defendant.

Case No. CR2003-21789
REPORTER'S TRANSCRIPT

BEFORE

THE HONORABLE RENAE HOFF
DISTRICT COURT JUDGE

Third Judicial District
Canyon County

OCTOBER 29, 2004

CONFERENCE ON INSTRUCTIONS

A P P E A R A N C E S

FOR THE PLAINTIFF: CANYON COUNTY PROSECUTOR'S OFFICE
By: Virginia Bond
Gearld L. Wolff
Canyon County Courthouse
1115 Albany Street
Post Office Box 668
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FOR THE DEFENDANT: RICHARD L. HARRIS
Attorney at Law
1023 Arthur Street
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Caldwell, Idaho 83606

CALDWELL, IDAHO, OCTOBER 29, 2004

(Counsel for respective parties present, along with the defendant.)

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THE COURT: All right. We're taking up State vs. McKay outside the jury presence. I have been meeting with the attorneys regarding proposed final instructions, and I had caused to be delivered 201, a verdict form, through instruction 211. I was also provided with a proposed instruction drafted by the defendant with regard to a lesser included of misdemeanor vehicular manslaughter.

I'll take up at this time first with the State. Mr. Wolff, do you have objections or concerns regarding the instructions or the verdict form?

MR. WOLFF: Judge, on the packet of instructions that you have provided to us, no, I do not have any objections.

THE COURT: All right. Thank you. Mr. Harris.

MR. HARRIS: Judge, if it please the Court, I have submitted to the Court this morning after the evidence has been presented an instruction on vehicular manslaughter that is an instruction that would activate subpart (c) of the vehicular manslaughter statute.

And I offer the instructions on this basis. The State has charged under part (b), which is a felony. There is evidence under the record that Shane McKay may well have operated this vehicle with a BA less than .08. Because of the differential in the time that the BA was taken and the time of the accident, the jury could well find that that didn't apply.

The jury could find, because of the speed issues that were presented in evidence of this case, that the unlawful act which triggers the culpability could be the infraction of a speed greater than the speed limit, which would then bring into operation the misdemeanor section of the statute, so the evidence would support the misdemeanor instruction. And it seems to me that the manner in which this case has been charged would also give the Court authority for the giving of this instruction.

We have talked briefly about cause, and

the dilemma is what to do about cause. And I have essentially taken the position that cause is something that I'm not requesting a jury on this morning, but it's certainly part of the dilemma.

THE COURT: All right. Thank you. Mr. Wolff.

MR. WOLFF: Your Honor, under Mr. Harris's theory and under the statute as alleged, there is either, A, no lesser included under the vehicular manslaughter as we have charged under subsection (b), or there are two lesser includeds, both (a) and (c), felony vehicular manslaughter with gross negligence under the interpretation of the facts that Mr. Harris wants to give. I wanted to make a record of that.

He's talking about the speed and only the speed. He's not talking about the crossing over of the double yellow line at the railroad track to oncoming traffic and running into the back of the motorcycle proceeding down the roadway in his lane of travel. That's gross negligence. It's reckless to cross the double yellow or to cross over a centerline at a railroad track. That's the statute. That's the reckless driving statute.

So there is more than enough evidence to

support the lesser included of felony vehicular manslaughter as much as there is to support a misdemeanor manslaughter without gross negligence.

That's not how we have it charged. We have this charged as subsection (b), under the influence and/or, in the alternative, with a BAC over .08. There's sufficient evidence in the record. Mr. Harris wants to attack the BAC, but if you remember Officer Woolery -- excuse me -- Officer Marek's testimony at the point when she made contact with Shane McKay at the scene within 10, 15 minutes of the accident, her opinion was that he was under the influence of alcohol, so that fact is right there at the scene.

Judge, we have charged under subsection (b). We don't believe there is a lesser included of misdemeanor manslaughter on the charge or the facts that you have presented to you. Mr. Harris wants to nitpick each and every fact here, and using his theory and logic, every criminal case would have some type of lesser included, and that's not the law. Lesser includeds are those offenses that come from the main charge that are factually supported by the charge and for which there's legally sufficient basis for a finding of guilt.

to obviously the statute, vehicular manslaughter. Manslaughter is the unlawful killing of a human being without malice, and vehicular can be committed in three different ways, (a), the commission of an unlawful act not amounting to a felony with gross negligence, and (c), the commission of an unlawful act not amounting to a felony without gross negligence.

The State did not elect to charge under (a) or (c). They chose instead to charge under (b), the commission of a violation of Section 18-8004 or 8006. In this case, they elected the driving under the influence under 8004.

I also looked specifically how Idaho defined gross negligence. Essentially, gross negligence is such negligence as amounts to wanton, flagrant, or reckless disregard of the safety of others.

And Mr. Harris has offered this instruction. I believe that I am precluded from giving it because this proposed misdemeanor vehicular manslaughter instruction can only be a lesser included under (a) of the statute. In other words, it can only be a lesser included because it would be less than gross negligence. (A) is with gross negligence. (C) is without gross negligence.

He can't have it both ways. If he has a lesser included, it's felony vehicular manslaughter before they even reach the misdemeanor vehicular manslaughter. We don't believe that it's appropriate for a lesser included.

THE COURT: All right. Thank you.

The Court has given a lot of thought to whether the giving of a lesser included offense could be given or the jury could be instructed to consider. And in doing so, I went back and looked at the two analyses for the consideration of lesser included.

A lesser included offense is one which is necessarily committed in the commission of another offense or, one, the essential elements of which are charged in the Information as the manner or means by which the offense is committed, and that's State versus McCormick, 100 Idaho 111, 1979, and ICR 31(c).

Having considered both ways to look at this, I always have to go back to the Information in this case, which specifically charges that Shane McKay did unlawfully, without malice, kill Ted Cox by operating a motor vehicle in the commission of a violation of Idaho Code Section 18-8004 under the influence of alcohol in this case.

So in analyzing this, I further go back

I agree that in their cross-examination of the State's experts that they may have raised -- the defense may have raised the issue and it was admitted that Shane McKay's BAC could have been less than .08 at the time that it happened, so that's going to have to be an argument that's made to the jury.

And as I see it, we're left with the one instruction and the one verdict form, so I'm going -- the instruction will be preserved for appeal that was proposed, and I'm ready to instruct the jury as I proposed in the instructions.

Mr. Harris, did you have any other concerns you wanted to raise about the verdict or the instructions?

MR. HARRIS: Judge, just one other comment. I understand the Court's ruling and will accept that ruling for purposes of this morning. But I probably -- and I just need to clarify my record on this, and that is that, as I understand that statute, it talks in terms of an unlawful act that caused the death.

The first one is an unlawful act not amounting to a felony with gross negligence. The second one is an unlawful act, meaning the DUI or being under the influence. The third one is an unlawful act

not amounting to a misdemeanor -- yeah, a misdemeanor, not a felony, but without gross negligence. And so as I read these three statutes together, it becomes an included offense because we're talking about an unlawful act in each event.

They've elected to charge under one felony statute, and the unlawful act could be the misdemeanor. They could find without gross negligence, which would bring into play number three.

But I understand the Court's ruling and we will proceed from there, Judge.

THE COURT: All right. At this time, then, we'll go ahead and have the jurors brought down and we'll proceed with final instructions. We are in recess.

****

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO,)
)
Plaintiff,)
) Case No. CR2003-21789
vs.)
) REPORTER'S TRANSCRIPT
SHANE McKAY,)
)
Defendant.)
)

BEFORE

THE HONORABLE RENAE HOFF
DISTRICT COURT JUDGE

Third Judicial District
Canyon County

OCTOBER 29, 2004

CLOSING ARGUMENTS

A P P E A R A N C E S

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Exhibit E

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO, Plaintiff,
vs.
SHANE McKAY, Defendant.

Case No. CR2003-21789
REPORTER'S TRANSCRIPT

BEFORE

THE HONORABLE RENAE HOFF
DISTRICT COURT JUDGE

Third Judicial District
Canyon County

OCTOBER 29, 2004

CLOSING ARGUMENTS

A P P E A R A N C E S

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CALDWELL, IDAHO, OCTOBER 29, 2004

(Counsel for respective parties present, along with the defendant.)

****

MS. BOND: Good morning, ladies and gentlemen. First of all, let me start off by telling you how much we greatly appreciate your time, your attention, and your presence here. Without that, we couldn't work this great system of justice that we all are within, and we're proud of it. So on behalf of myself and Mr. Wolff and the prosecutor's office, we thank you.

Let me draw your attention to one thing as I start opening argument here. Notice, if you will, that I have never used the term "accident" during this presentation of the case, and there's a reason for that, because this case was not an accident. This case is a situation of willful conduct. This is choices that were made by an individual, and these choices resulted in the death of someone's loved one, and

accountability is the factor.

In this particular case, the person who made those choices is Shane McKay. He made the choice, number one, to consume alcohol. He made the choice, number two, to drive an automobile. And he made the choice, number three, to drive that automobile in a reckless and careless manner taking the life of Ted Cox.

This is no accident. This is a wreck. This is a collision. This is a crash. This is what we're here about today and what we've all spent the last four days covering as evidence.

The State does have the burden of proof as always, and the State has to prove certain things. And to prove certain things, we have presented facts through testimony here. You must weigh and determine which of those apply and basically decide what happened in this case.

Let's go over those elements first. This is kind of what I call the building blocks of our case. First of all, the State must prove that this crime occurred on or about October 5th, 2003. Several people have talked about that, police officers, Mike, Monique.

That this crime occurred in Canyon

County, state of Idaho. Police officers again. It happened behind the Lowe's. Yes, that's in Canyon County, state of Idaho.

Number three, that Shane McKay drove or was in actual physical control. He admitted it, admitted it to Tonna Woolery.

Motor vehicle, the Cadillac that is sitting over at the shop that you saw.

And this happened upon a highway, street, bridge, or property open to the public. Several officers testified about, that that's a road they travel every day. Ed Robertson, for one, told you about that road and the contour of it specifically.

And under the influence of alcohol, four, over .08.

These are the building blocks of this particular case, and I've gone over some of the facts that you've heard in court through the testimony that support that. So once you realize, of course, that this is not an accident, the way that we start with looking at it is the first person that we heard testify, Steve Wood.

Steve didn't know these folks that were coming in front of him. He looked up. He was driving that road with his kids in the pickup and saw two

lights. He thought first it was a car. No, it's too wide. Those are motorcycles. So he had his window open. He looked out and admired the motorcycles going by him, and he looked up and saw a car halfway in his lane.

He was crossing the railroad tracks the bikes had just crossed. He saw this car coming at a high rate of speed and swerved back into the other lane heading toward K-mart, and he thought he doesn't have room, there's not enough room. Just as he thought that, he heard the crash, saw the dirt fly. The tremendous noise that accompanied this crash woke his little girl up.

He pulled over to the side of the road and called the police as Monique ran toward him frantic. He didn't go back to the scene, but his impression of this was very clear in that he saw the motor vehicle coming, it was on the wrong side of the road going back into the other lane, and heard the crash.

And remember, I asked him if he had any background in estimating speed, and his estimate was 60 miles per hour. So when you look at the facts that Steve purported, they line up with what also Mike and Monique testified to.

Mike and Monique were there. They were on the motorbike next to Mr. Cox situated closest to the centerline of the road. Mike was also driving a Harley-Davidson and Monique was on the back, and her job was to check all the taillights and all the equipment on the bikes. They had gone to Denny's to get the ranch dressing, had gone by the sugar beet factory, had come over the overpass to the highway and was headed towards Shari's to eat.

They reported, both of them, that this is a hard tail motorcycle. It's got no shocks, so you have to go slow over bumpy areas like railroad tracks, so they slowed down. As they slowed down, they went over the railroad tracks and they both looked over at Ted, and he was laughing, he was smiling, making some gesture. Suddenly, he was gone. He was gone forever. They felt this great rush of wind, and Ted was gone.

There was parts of metal. There was dirt flying in their faces. They never saw it coming. They never saw it coming, which might be a clue to interpreting what Ed Robertson testified about.

They pulled the bike over. It came to a stop. Mike ran over and found his brother, who he refers to as his brother, dead, obviously dead. He covered him with his leathers and looked over and saw

the car and somebody running around outside the car. He was tremendously angry. Someone had just killed his friend, his brother. He went over and he grabbed this person and he hit him and he put him down on the ground by his friend and stayed there holding him until the police arrived.

And when they arrived, the first one that came there was Tonna Woolery. She was a relatively new officer that came upon the scene. She was the first one there. She went over to where Shane McKay was, and in her conversation with him, she noticed a few factors.

This is State's 25. She smelled the odor of an alcoholic beverage. She saw bloodshot eyes. She saw some behavior that concerned, and his speech was slurred, the things he was saying, so she made a decision that he was perhaps under the influence of alcohol and asked him if he'd been drinking. He admitted it. He'd been drinking. So when she looked at the scene and saw that there was a deceased there, the decision was to take him to the hospital where Stephanie Brannan drew blood and Tonna Woolery took custody of it and that blood went to the lab.

Dave Laycock analyzed it, and Dave Laycock testified that the blood alcohol content was a

.15, which is almost twice the legal limit. Impairment at that particular level would match up with the driving behavior in this case, according to Ed Robertson.

.15 was within an hour and a half of the wreck. Dave Laycock testified that it would take approximately seven drinks to get to that point, plus some additional ones to keep that level going. So you can figure out if he hit Mr. Cox at this particular time and the blood came at this particular time, when would he have consumed those seven drinks. And the law in this case is perfectly clear. If you're over a .08, you are driving under the influence, and if you drive under the influence and kill someone, then you should be held accountable.

After Dave Laycock testified, you further heard the testimony of Tony Evans. Now, Tony Evans came upon the scene after Tonna Woolery. He also had conversation with Mr. McKay and told you that he smelled alcohol and saw his bloodshot eyes. Both officers saw the same impairment indications.

Tony made these measurements back here, measured from the railroad track, took those pictures, and found what he thought was the point of impact.

State's 18 is that gouge mark in the

pavement. This is the issue that Ed Robertson covered with you, this gouge mark and the tire prints that are along each side of it. His interpretation was that that gouge mark came from the car hitting the motorcycle and the motorcycle's back tire stopping and that caused the rubber burn. He addressed how the motorcycle went sliding down the pavement and ended up right where Tony says it ended up, and it should have ended up there.

Ted's body ended up at this point at a lesser distance than the motorcycle. And it makes sense, of course, with the direction the Cadillac traveled which ended up right there high-centered on that particular curbing.

As Tony was there at the scene, he was taking measurements from Midland Boulevard, which is somewhere out here. He took photographs. He saw what he termed as vapor trails. And there's been a lot of discussion about those vapor trails. We had a lot of education yesterday. I was really confused with the math. I hope everybody else was too.

But those vapor trails and those pieces and fragments laying on the roadway are only leading up to the point where Ted's body is and that motorcycle is, and then there's a big gouge mark right there.

In this particular case, the big question is was this vehicle out of control, and both experts talked about that. Let's think about what Fred Rice said first of all. He said he took those measurements, he took the photographs, he looked at them, he put together the information and provided a report which indicated that this was a vehicle out of control. It was out of control back here, clear back here before the railroad tracks. And as it's out of control there, it's coming across the railroad track leaving those scuff marks. Not tire marks. Scuff marks. That shows out of control.

It veers into the lane here, and Ed talked about an angle, talked about an angle and, bang, it hits into that motorcycle and sends it flying. This is an action out of control. You lose control here, you overcorrect to go back into your lane, and that's what resulted in this impact. Why Mike wasn't hit and Monique wasn't hit, it's somebody bigger than us with them that day.

Ted was. Hopefully, Ted never saw what was coming. The paramedics told you what his injuries were. He had a fractured skull. He had broken bones in his arms and legs. He had a broken neck. These particular injuries are consistent with the motor

vehicle wreck that we've described here, and they killed Ted Cox.

Fred Rice did not do speed based on one factor. Fred Rice did not do speed based on one factor. Fred Rice did speed based on three, the Cadillac, the body, and the motorcycle, and he came up with approximately the same figures. Conservatively, 65 miles per hour is the speed he figured, and he had the numbers. He even variated the numbers up there on the witness stand. These were cold, hard, scientific numbers. These aren't guesses and these aren't daydreams. These are based upon the measurements of Tony Evans out there at the scene.

And not only did he do it three ways, he ended up doing it the fourth way right in front of this Court with the splatter information. Remember when he dropped his pen and that was like a time-distance thing? He put it into the range that I could understand of the motor vehicle and how the motor vehicle could impact the motorcycle pushing it forward.

State's 9, this impact right here to the rear of the motorcycle is what we're talking about. It was a very hard impact. It wasn't a little bump. This was a smack, a high degree of velocity which sent the Cadillac, the motorcycle, and everything down the road.

Fred Rice testified that those liquids didn't have time to spill out until they got further down the road, which is consistent with velocity in that cup thing that he showed us. So all that testified to is consistent with the facts and the measurements that Tony Evans took and is consistent with the eyewitness testimony of Steve Wood, Mike, and Monique.

And you also saw this motorcycle, so you know how hard it was hit. This motorcycle was hit so hard, State's 10, that Tony Evans had to pull that license plate out of the back side of that motorcycle. It was embedded in there. He didn't even see it at first. And that license plate goes to the Cadillac.

The other thing that Tony Evans found at the crime scene, 22 and 23, are pictures of the license plate. You can study these more closely when you get back in the jury room. And Mr. Paulson showed you how the brackets on this attach to the light fixture that was affixed to the back of Ted's motorcycle. Three people testified they saw that light there that night. Mike, Monique, and Mr. Paulson, they saw that light. This license plate was affixed to it. Without the light, the brackets of this license plate wouldn't have held it in place.

Ted was very proud of this motorcycle he called Mumra. He'd had her longer than Mikey's been alive, and that motorcycle was a big part of who he was. He went to that shop every Saturday. His friends rode. This is his fun and his enjoyment, and he took pride in her, and there's this taillight right there with his license plate on it. Why would he take that off? It wouldn't be safe. They check on that for each other. It wouldn't be safe.

Because of Mr. McKay's careless driving and his choice to consume alcohol, Ted Cox was killed violently. There's brain matter along the road. There was brain matter around him and coming out his ears. He had breakage. He flew through the air quite a distance. His glove, his glasses, the vest, everything flew off of him as he was pushed by the weight of the Cadillac.

Remember, Ed Robertson testified that Cadillac probably weighs 4,000 pounds. There's no pavement that's even going to stop that Cadillac, and that's what hit Mr. Cox at 65 miles per hour from behind sending him vaulting through the air.

What about Ted Cox's drinking that night? It was the last night of his life. He was visiting friends. He saw his mother. He was,

according to the experts, in his proper lane of traffic right here. He wasn't swerving. He didn't pull out in front of Mr. McKay. He was in his proper lane of traffic. He was drinking, true, but drinking doesn't involve the death penalty.

Was there any contributing factors I asked each of the experts. The only contributing factor was that he was there. This was not his fault.

And Ted had a good life. He shared it with his loved ones, and they are robbed of him because of the choices that were made by Mr. McKay, the choices to consume alcohol, the choices to drive a car, and the choices to drive that car in a reckless and dangerous manner. Because of those choices, he killed Ted Cox and robbed him of life. And for this, he should be held accountable.

This is not an accident. This is willful conduct. What you need to do is consider the facts, the testimony, the blood alcohol content, what the reconstructionist said, what the eyewitnesses say, because if you think about it in the big picture, you'll see what Steve Wood said about speed and position and what both the experts said about speed and position are the same. This was no accident.

I'm going to be able to address you

again as soon as Mr. Harris is finished, but we would ask you to once again consider all the facts before you make a decision. Thank you.

THE COURT: Thank you, Ms. Bond.

Mr. Harris, you may proceed.

****

MR. HARRIS: If it please the Court, counsel, ladies and gentlemen of the jury. I'm a Cubs fan, but how about those Red Sox? I wish we were here talking about baseball rather than what we're talking about this morning.

This is an unfortunate and tragic accident. It's tragic to both families and to their friends. But, ladies and gentlemen, what this is is an accident.

This is what is known as closing arguments. It's the time that the attorneys get an opportunity to visit with you as jurors. What we say to you is not evidence. I want you to be perfectly clear about that. If your recollection of the evidence is different than mine, you rely on yours. I'll not try to mislead you, but as I've indicated, if your recollection is different than mine, you know what you

need to do.

Let me talk about this instruction that you have received. That instruction lists those six items that the prosecutor has put up on that board, but unfortunately or intentionally, the prosecutor has failed to put one other additional element that is part of that instruction, and I'm going to take the liberty of putting it on there because as you get that instruction in the jury room, you'll notice that there is a number seven, and that number seven has the word "cause" in it.

The way the vehicular manslaughter statute is written, it is written in the format that the driving of the vehicle and the commission of an unlawful act that causes death is a violation of that statute.

In this particular instance, in order for there to be a violation of the statute, you must find that Shane McKay drove the vehicle -- we don't deny that -- on a highway. That's obvious. It's alleged by the prosecution that he was either under the influence or had a BA greater than .08 or .08 or greater.

And they stopped right there because they take the position that if you do that, you are

guilty. That's not the instruction on the law that has been given you by Judge Hoff because it contains the additional word, that must cause the death of Mr. Cox.

There's another instruction that needs to be talked about briefly, and that is that in every criminal offense, there must exist the joint operation of act and intent. And where is the act and the intent in the evidence that you've received that caused the death of Mr. Cox?

Let me just address some issues having to do with evidence in this case. And there's a number of issues that you'll have to sort out with reference to the testimony of Mr. Warren, Ms. Crownhart, and Scott Paulson. There is the issue of the position of the bikes on the roadway. There is the relationship of those bikes with each other.

There is the issue of the drinking of Mr. Cox. You'll remember that they said that he'd only had one drink, that he was essentially a non-drinker, and yet, it's not possible under the law or under the facts that a person driving on the roadway with a .19 BA was not a factor in what happened.

But I'm very well aware of human nature and I know that friends and, in this case, brothers, shade the truth. I think Scott Paulson and all said,

you know, we will cover for each other, and that's going to be important later on in my argument. But it's your assessment of the credibility of those witnesses and the assessment of where they say things were in the entire context or the totality of the circumstances of this case.

You have heard evidence, and I would submit to you that Shane was very much traumatized by what happened. They described him as crying, and the picture that was put on the screen indicates that he was crying. It's obvious that his eyes were red. He had been battered by Warren.

I think he said that -- I think there was some evidence that while he was crying, he was praying. He kept repeating it was an accident, I didn't mean to hit him, he popped out of nowhere, I didn't see him, it was an accident. He kept repeating that over and over.

Now, the prosecution wants you to believe that at the time of this accident, Shane was under the influence or over the legal limit. And even though there was a BA of .15, as I recall, approximately an hour and forty minutes after the accident, the State's expert, the witness they called, said that at the time of the accident, it's entirely

possible that his BA was less than .08.

He said it would take seven -- I think it was seven drinks. I don't know how many of you are familiar with drinks. I'm not. I had learned this. But supposing he had a Long Island iced tea just before he left where he was, that contained enough alcohol to get you there, but there's an absorption rate, there is an elimination rate.

And it may have been a .15 an hour and forty minutes after the accident, but as their expert says, it could very well have been less than .08 at the time of the accident. Ladies and gentlemen, that is a reasonable doubt.

The prosecution wants you also to believe that the injuries received in the accident caused the death of Mr. Cox, and it seems clearly apparent that that's the case. And because it seemed apparent to the people in charge of this, no autopsy was ordered.

Ladies and gentlemen, I've been either a prosecutor or defense attorney for over thirty years and I've handled lots of homicide cases. This is the first case that an autopsy hasn't been performed.

And I'll tell you why an autopsy is performed. It's not only to establish cause of death,

but it's to establish that cause of death to the exclusion of every other cause and to establish evidence.

MS. BOND: Your Honor, I'm going to object to him testifying about some facts that were not in evidence.

THE COURT: I'll overrule the objection. I think he can make his argument. I'll continue to entertain that issue if you want to revisit it.

MR. HARRIS: I don't know if any of you watch Law and Order on television. Approximately a week ago on that episode of the program, there was a situation that occurred -- I didn't see the program, but it's been related to me -- that a person, a pedestrian, was struck by a car.

The injuries and cause of death seemed clearly evident by what occurred. When they performed the autopsy, they discovered a subdural hematoma that had occurred as the result of an occurrence some time prior, and it was that subdural hematoma that was the cause of death, not what appeared to be the apparent injuries of the car/pedestrian accident. Ladies and gentlemen, that's another element of reasonable doubt.

I don't know how many of you watch Bill O'Reilly and The O'Reilly Factor on the Fox News

channel, but he describes his program as being a no-spin zone, and he uses the word -- a word that I learned, I never heard it before then, but he used the word "blowvitate," which means, in the vernacular that I'm familiar with, don't baffle me with your BS.

And let me talk about that in context with some testimony. And in this particular case, each side is represented by an attorney. Each side has had expert witnesses come and testify. There's been a lot of evidence regarding credentials and qualification and that one side's credentials, because they belong to organizations, that makes them somehow more credible and more important than the other side.

But to put that again in context, I'm licensed to practice law in the state of Idaho but I don't belong to the American Bar Association, I don't belong to the Idaho Trial Lawyers Association, I don't belong to the Idaho Criminal -- or the Idaho Lawyers for Criminal Justice. Does that make me any less a lawyer qualified to come before you and represent my client in this case? I am licensed to practice before the courts in the state of Idaho, before the federal courts in Idaho, before the Ninth Circuit, and before the United States Supreme Court, but I don't belong to these voluntary organizations.

Ms. Bond, in the course of the examination of Mr. Freeman, worked him over about that affidavit. Unfortunately, I was the one that drafted the affidavit. And we were in a hurry and he signed it, but that's what happened.

Let me come back and talk about the experts for just a minute, and particularly Mr. Rice and Mr. Robertson and some contradictions in their testimony opinions.

First, Rice testified that the proof of impact where it is on that diagram over there was caused by the rim -- the rim of the rear wheel of the motorcycle. Robertson said it was a cross-member on the Cadillac. Rice said it was a straight-on collision. Robertson said it was at an angle.

And they gave a lot of testimony, but let me try and give you an example of the subtlety of the testimony and the ability to massage and manipulate facts to comport with their formulas and so forth.

Talking about that no-spin zone, you remember Mr. Robertson talking about a requirement that a headlight had to illuminate the road 250 feet ahead and that he used I believe it was 65 miles per hour and that a car stops in 204 feet and, therefore, he should have stopped because that is less than the 250 feet

illuminated by the headlight.

And I agree with him that it takes 204 feet to stop, but what he did not include in that number is some reaction time on the part of the driver to perceive and to apply the brake. Once the brake was applied, it's 204 feet, but there is a lag time in order to get there. That's how facts are massaged and manipulated.

And so I guess what I'm trying to point out there is that he's telling the truth as far as the truth goes, but the answer is not complete. And because it's not complete, it's misleading. The fact that there is a reaction time there extends, in that instance, the stopping distance by almost a third. So instead of stopping at 250 feet within the headlight, you stop at 290 feet.

In addition, I noticed the tendency to filibuster, to manipulate information. But, ladies and gentlemen, you are the arbiters of their credibility and their testimony.

One of the things about this case that has been a puzzle to me for a long time and is a disagreement between the State's case and their experts and me and my expert, and that has to do with this point of impact because that is an important

consideration for you as jurors in this case.

Where is the point of impact? You listened to the testimony of Mr. Wood. Mr. Wood testified that had the car crossed over his lane, went off the left edge of the road and tried to come back, there would have been a head-on collision with him. You listened to his testimony as he said with reference to the car that was coming down in the other lane of traffic, it crossed, he believed, the centerline, went back into that lane. It never did come completely into his lane of traffic. And again, on this diagram, if that occurred, it would have been much further down the road to the east than what is depicted here. He would have seen that. He never saw it. He never testified to it.

He testified as to what happened, and Mr. Rice's comment about his testimony was, well, he didn't perceive it correctly, he didn't see what he saw. Why is that important with reference to this point of impact and why is it important with the testimony of the experts that reconstructed this accident?

It's important because the State's experts did not reconstruct this accident. What they have done is they have taken Officer Evans' -- yeah,

Tony Evans' theory of this case and they have defended it. And Brant Freeman looked at these same facts and reconstructed the accident as to what happened.

And you remember -- and I don't remember whether it was Mr. Rice or Mr. Robertson that testified that reconstruction of an accident is taking all the pieces of a puzzle, all of the elements that are there, and putting them together and figuring out what happened.

Now, that wasn't really what happened here. What really happened is that they, as experts for the State, took the theory of this accident formulated by Mr. -- Officer Evans and defended it. Brant Freeman took those same facts, totality of the facts, and in my judgment, determined what really happened, and this is why. You'll remember during the course of the trial --

Could I have Exhibit A, please?

You're going to have this when you get in the jury room, but during the course of the trial, I had the witnesses look at this numerous times. And if you go to page 3 -- page 1 and 2 depict the roadway of Karcher before you get to the railroad tracks and it's got what purports to be where the Cadillac left tire left the roadway, came back on the roadway. The second

page again has the railroad tracks. It has the point -- what Tony Evans alleges the point of impact to be. And then it has the distances from that point to where Mr. Cox was, to where the motorcycle was, to where the tire marks first went onto the curb and where the Cadillac came to rest.

And up in the right-hand corner of that, you'll also notice the vapor trial of number two, which is the Cadillac, vapor trail number one, which is the motorcycle. And you'll all probably remember the testimony having to do with those vapor trails or, as Mr. Freeman describes it, the liquid debris.

The third page of this exhibit is important for you once you get in the jury room to discuss this accident. You will notice that at the bottom of this exhibit, there is a gouge mark purporting to be where the point of impact occurred. That gouge mark corresponds with the gouge mark on the second page, which is where they allege the point of impact was.

Coming back to the third page, this was measured by Officer Corder of the ISP and Officer Evans. From the gouge mark to a point 83.1 feet downrange from that gouge mark, there are no marks, no marks. We're not talking about liquid debris or vapor

trail. We're talking about marks. From 220 feet, which is from this point to this point, it's labeled rear wheel skid mark of motorcycle, 220 feet.

If you listen to Mr. Robertson and Mr. Rice, the motorcycle -- when this accident occurred, the motorcycle laid right down and skidded along the pavement all the way to where it came to rest. There are no marks for the first 83 feet. There should have been marks, and there were none.

The only thing that can explain that is that the motorcycle was airborne for that 83.1 feet and finally it landed and then the marks began. That contradicts -- and it would be impossible in the first place because of weight and gravity, but it contradicts the testimony of Mr. Rice and Mr. Robertson because there would have been marks and there were none. And then finally, there's another 87 feet where it finally came to rest from the marks that were put on the road.

And then we come back to these distances having to do with the vapor trail, and those are the numbers in the upper right-hand corner of page 2 of the exhibit. The distance that they have established on these notes is the vapor trail of the motorcycle started at 780 feet west, and that is by a process of subtraction, if my math is correct. And I don't claim

to be the greatest mathematician, but it's 74.5 feet from this point of impact. The vapor trail of the Cadillac starts at 790 feet west, and that number -- where have I got it here on my notes -- is 73.5 feet. Excuse me. It's 79 feet.

So how do you put this together? What's the meaning of that? The vapor trails and the marks correlate very closely. The debris field starts downrange from 83.1 feet. That's where the debris was found. We know that if the point of impact was where they say it is, there would be marks on the roadway by both vehicles, particularly the motorcycle, during that 83.1 feet where they measured. They looked. They never found any.

That's what Brant Freeman was testifying about because that has to mean that the point of impact is down there where this 83.1 feet, that number is. He said that it has to be in close proximity to that number. That makes sense to me.

As you look at the totality of the evidence of this case, the theory of this accident propounded by Officer Evans doesn't make sense. It doesn't make sense for a number of reasons, not only the testimony of Mr. Wood, but the marks on the roadway as they come across the railroad tracks.

And again, that was a puzzle to me because I believe it was Mr. Rice that said, well, these are scuff marks, the ones that come from the eastbound lane into the westbound lane, and they look identical to the marks that are in the westbound lane -- or excuse me -- yeah, to the eastbound lane, but those are not scuff marks, we don't know what they are. And you look at them and they look identical. And Brant Freeman testified that he looked at them and blew the pictures up, looked at them under a magnifying glass and could see no difference. That doesn't make sense.

The speed doesn't make sense because what happens with the point of impact with the State is you've got to elevate those speeds. It's actually 71 miles an hour. And Mr. Rice hedged a little bit saying it was 65, but his calculation is actually 71 miles per hour. If he was off the left edge of the roadway, in 1.1 seconds, you've got to cross over across the railroad tracks and get situated in the westbound lane of traffic to directly collide with the motorcycle. I suppose that's possible, but the probability of it, of that occurring, you know, it just isn't there. That doesn't make sense.

Ladies and gentlemen, when you retire to

the jury room, you bring with you your common sense and your experience, what makes sense to you. And I submit that, at least to me, what makes sense is not the theory of the accident that Officer Evans came up with. That just doesn't make sense to me at all.

If Brant Freeman is correct and the point of impact is downrange from where they got it to the close proximity of 83.1 feet, that significantly reduces the speed of the vehicles. That is reasonable doubt.

A number of years ago I was in a trial, and I thought the case was one of those slam-dunk cases, there isn't any way in the world that you can lose it. And I was taught a lesson by a very good trial lawyer, one of the better ones in Idaho, and he said that in the course of a trial, there is usually something that occurs, probably that seems to be insignificant, but as you analyze it, it really determines what really is the case.

And so since then, I have sort of paid attention to that, and I think there's such a thing in this case, and I'm going to start with this. This is the motorcycle. It's the pre-accident motorcycle. You listened to all the witnesses testify that, as far as they knew, this was an identical representation of the

accident -- or excuse me -- of the motorcycle at the time of the accident. There wasn't any changes. Some of those witnesses worked on it, but there weren't any changes. That's the way it was. That's the way it was.

And yet when they got to the scene of the accident, the only thing that was found there was the license plate, and they took pictures of the license plate. We've got those photographs here. Is there a difference between the license plate on the ground and the license plate on the motorcycle?

And when you get in the jury room and you look at these photographs, you will see that there is an acorn nut missing from the license plate and you will notice that that nut is missing on the bottom left. And you'll notice that in the photograph of the license plate on the ground at the scene, that nut that's missing is the upper right. What does that signify? What does that mean?

If you look at this -- let me try and explain it as best I can. When it was first photographed, as I understand it, it was face down, the numbers were face down. That license plate was originally part of a -- there was a bracket that is part of the unit that fits the taillight, the taillight

housing, and there is a piece of steel that fits on the -- that would fit on the back of the license plate which supports and provides protection and support to the license plate.

We all know how flimsy license plates are. But this piece of steel encapsulates the license plate, and it is that piece of steel to which these bolts that I've indicated to you from the other photograph, that's mounted to the bracket that is part of that taillight housing, and that's what attaches them all together.

It's obvious that that license plate was broken. It was broken away from the taillight. Well, when did that occur? It did not occur when this accident happened. It occurred sometime prior to that. It occurred sometime between August 16 when that photograph was taken and the time of the accident.

And then let me bring you back to Scott Paulson's testimony. Scott Paulson testified that he and Mr. Cox were together and they had a run-in with another guy on a motorcycle. They took their motorcycle and chased that guy down, cornered him, and there was an altercation. He testified that there was damage done to the motorcycles. He testified there was damage done to Mr. Cox's motorcycle. He testified

there was a dent in the fuel tank. He did not testify that there was damage done to the taillight, but it certainly could have occurred then. But, ladies and gentlemen, it occurred sometime between when that photograph was taken and the accident because the bolts are changed.

If you'll remember the testimony of all the witnesses -- well, most of the witnesses anyway -- there is no lens glass from the taillight on the ground or anywhere at the scene of the accident. If you look at the metal, and they describe it as being pot metal, probably is, but that is a large piece of metal that houses that taillight. None of that metal was found. Officer Evans testified he searched for hours trying to find it. He didn't find it. Why didn't he find it? The license plate was there. That taillight and that housing was not there. There was not a taillight on the Cox motorcycle that night.

I don't know when the damage to it occurred. It certainly could have occurred when Scott Paulson and he had the altercation with the other guy on September 20th. It could be that they ordered another one in and it hadn't arrived yet so they hadn't put it on and they attached the license plate with a wire or something because he was driving around. But

the taillight was not there. And as Mr. Freeman testified, you can't yield to what you can't see.

And if you come back to cause -- see, that's number seven on the board that the prosecutor left out -- what was the cause? The cause was no taillight. He couldn't see it. Mr. Cox was driving. We know that he had a .19 at the time of the accident. Was that a contributor, the fact that he was driving out there without a taillight? In my judgment, certainly.

Ladies and gentlemen, reasonable doubt has been shown. There is reasonable doubt in this case. I recognize, and Mr. McKay and his family recognize, how tragic and unfortunate this situation is. But, ladies and gentlemen, it was an accident.

I ask you to return a verdict of not guilty because the State has not met its burden of proof, and the only way justice will be accomplished in this case is by a return of not guilty.

Again, I thank you so much for your attention, for your time that you've spent, that you've given in considering this matter. Thank you very much.

THE COURT: Thank you, Mr. Harris.

****

MS. BOND: The State in this case had no intention of leaving out number seven -- this is why we get the last word here -- because number seven is all about Ted Cox. That's what this case is about. That's what we're going to focus on here once again in our rebuttal is number seven. It sums it all up because Mr. Harris didn't give you the whole picture either.

Let's put it down here in totality. And the defendant's, which is Mr. McKay, operation of the motor vehicle caused the death of Ted Cox, a human being. He did cause the death of Ted Cox. That's exactly what this case is about. I'm glad he pointed that out for me because that is the most important element exactly, dead on.

Ted Cox had a life and he had a family and he deserved to live. He was killed by a driver that was under the influence of alcohol. You heard it, this is an accident. This is no accident. This is willful conduct.

We should rely on the testimony of an expert who hasn't had any updated training for fourteen years, who is paid a large amount of money to come up with a theory that fits for Mr. McKay, an expert that didn't come up with any numbers, didn't do computations for you, an expert whose attention to detail is quite

evident from the affidavit, that's who we're supposed to rely on?

And for some reason, he knew there was no taillight? Whose fault is it that that taillight's gone? The car hits it full speed, almost 70 miles per hour, and it's gone and that's Ted's fault? There was a screw found by Ed Robertson and the other mechanic in the fender with a piece of pot metal on it with a fresh break. Remember that testimony. Remember that testimony because that's important. A fresh break, pot metal, explodes, a huge crash, lots of power. That was not Ted's fault. Ted was not driving the Cadillac. Mr. McKay was driving the Cadillac. He was driving the Cadillac after he had drinks and he was driving fast.

This is also what this case is about. It's about the obvious. Well, they didn't do an autopsy. Let's take a look at this. It's real small here, but not really when you get this picture. You will see this right here. That's what's left of Mr. Cox. That's a piece of brain matter that's along the highway. Let's not look at the obvious. Let's look at the little tiny detail.

They're asking you to speculate that there's no taillight so there's no responsibility here. Do we want to decide this case based on speculation or

do we want to decide this case based on fact, a fact like depicted here, a fact like brain matter, a fact like a license plate shoved all the way into this motorcycle that Tony had to pull out of there, facts like a gouge mark, which is a mark, it's a mark prior to 83 feet?

We're trying to manipulate the facts here, manipulating the information? Every one of the State's experts had numbers, they had credentials. They do this work currently. They are up to date. They teach others. They have a law enforcement background and training and it's current.

He has an expert that says it's police policy to seize vehicles, which both officers said it's not the case. They don't keep these vehicles unless requested by the prosecutor's office.

And intent, act and intent. Another good point made by Mr. Harris because the act here, the act of how he drove that vehicle, running off the road out of control, coming back onto the road at a high rate of speed. Sure, the car's a good car. It could have made it, but the driver wasn't capable. The driver was impaired. Reckless conduct slamming into the back of Ted Cox. The act itself is indicative of what the intent was. Mr. McKay made the choices here.

He made the choices to drink and drive and drive fast, not Ted Cox.

I want to address Steve Woods again once more. Steve Woods was looking at the motorcycles -- this is his testimony -- and when he looked up, he saw the car halfway into his lane. Completely consistent with the State's theory in this case.

They want you to believe that the splatters and where the vehicles hit are clear down here because it lessens the speed, of course, but does that really make sense? I mean, you saw it right here in court. Those fluids are not going to fall down if a car is moving -- let me see if I can get it right. Every second it moves 90 feet if it's going 60 miles per hour. That's quite a force. That's quite a push. It's taking it down the road a way before it dumps it, and that only makes sense. We saw it happen here in court with the cup. So really, blowvitating? Who's blowvitating here?

We want fact, we want the truth because that's what justice is about, and Ted deserves it. He deserves the truth and he deserves justice and so does everybody else in society. If somebody takes everybody else's life on the road into their hands and dares to go out and drive under the influence, they should be

punished. And in this case, a .15 is quite indicative of over the legal limit.

Number seven is the crux of this case because Ted Cox is the one that paid the price here. The State is going to ask you to return a guilty verdict for Mr. McKay. Thank you.

****

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF CANYON)

I, CAROLE A. WALDEN, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That said proceedings were taken down by me in shorthand at the time and place therein named and thereafter transcribed by means of computer-aided transcription, and that the foregoing transcript contains a full, true, and correct copy of said proceedings, consisting of pages 4 through 59, inclusive.

I further certify that I have no interest in the event of this action.

WITNESS my hand and seal this 15th day of August, 2006.

_____
CAROLE A. WALDEN, CSR NO. 71
Notary Public in and for the State of Idaho, residing in Caldwell, Idaho.
My commission expires 10-29-2011.

LODGED with me this _____ day of _____, 2006.

G. NOEL HALES, Clerk
By: _____, Deputy

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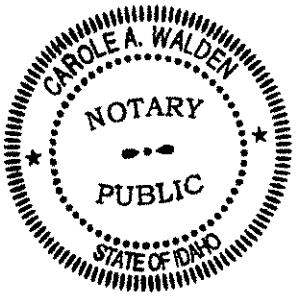

Carole A. Walden
CAROLE A. WALDEN, CSR NO. 71
Notary Public in and for the State of Idaho, residing in Caldwell, Idaho.
My commission expires 10-29-2011.

LODGED with me this 16 day of August, 2006.

G. NOEL HALES, Clerk
By: J Heideman, Deputy

State v. McNairIdaho App.,2005.
Court of Appeals of Idaho.
STATE of Idaho, Plaintiff-Respondent,
v.
Hugh S. McNAIR, Defendant-Appellant.
No. 30109.

Jan. 10, 2005.
Review Denied March 10, 2005.

Background: Defendant was convicted in a jury trial in the District Court, Fourth Judicial District, Valley County, George David Carey, J., and Henry R. Boomer, III, Magistrate, of misdemeanor vehicular manslaughter. Defendant appealed.

Holdings: The Court of Appeals, Lansing, J., held that:

(1) negligence on part of defendant was required element of vehicular manslaughter;

(2) criminal complaint was not jurisdictionally defective for not alleging *that defendant's failure to maintain his lane* of travel was product of negligent act or omission; and

(3) jury instructions were erroneous for not requiring finding that defendant was negligent before he could be found guilty of vehicular manslaughter.

Vacated and remanded.

West Headnotes

[1] **Automobiles 48A ⚿344**

48A Automobiles
48AVII Offenses
48AVII(A) In General
48Ak342 Homicide
48Ak344 k. Manslaughter. Most Cited Cases

Negligence on part of defendant was required element of vehicular manslaughter. I.C. § 18-4006, subd. 3(c).

[2] **Statutes 361 ⚿181(1)**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ⚿184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

Statutes 361 ⚿208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and Related Clauses. Most Cited Cases

When a court must engage in statutory

construction, its duty is to ascertain and give effect to the intent of the legislature; in so doing, appellate court looks to the context of the statutory language in question and the public policy behind the statute.

[3] Statutes 361 ⚿223.2(.5)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(.5) k. In General. Most Cited Cases

When an ambiguous statute is part of a larger statutory scheme, appellate court not only focuses upon the language of the ambiguous statute, but appellate court also looks at other statutes relating to the same subject matter and consider them together in order to discern legislative intent; even when a statute is not ambiguous on its face, judicial construction might nevertheless be required to harmonize the statute with other legislative enactments on the same subject.

[4] Statutes 361 ⚿241(1)

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k241 Penal Statutes
361k241(1) k. In General. Most Cited Cases

When a court must engage in statutory construction, appellate court is obligated to apply the doctrine of lenity, which requires courts to construe ambiguous criminal statutes in favor of the accused.

[5] Automobiles 48A ⚿351.1

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak351 Charging Instrument; Summons or Ticket
48Ak351.1 k. In General. Most Cited Cases

Criminal complaint was not jurisdictionally defective for not alleging that defendant's failure to maintain his lane of travel was product of negligent act or omission in vehicular manslaughter prosecution; although complaint stating that defendant slid his vehicle into oncoming northbound lane was defective for failure to allege any negligence or other culpable mental state, both the first and second alternatives in complaint that defendant drove carelessly, imprudently or inattentively and drove at speed greater than was reasonable and prudent under conditions made clear references to negligence. I.C. § 18-4006, subd. 3(c).

[6] Indictment and Information 210 ⚿60

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k58 Subject-Matter of Allegations
210k60 k. Elements and Incidents of Offense in General. Most Cited Cases

A charging document will be deemed so flawed that it fails to confer jurisdiction on the court if the facts alleged are not made criminal by statute or if the document fails to state facts essential to establish the offense charged.

[7] Criminal Law 110 ⚿1032(5)

110 Criminal Law

110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1032 Indictment or Information
110k1032(5) k. Requisites and Sufficiency of Accusation. Most Cited Cases

Indictment and Information 210 ⚿193

210 Indictment and Information
210XIV Waiver of Defects and Objections
210k193 k. Defects and Objections Which May Be Cured or Waived. Most Cited Cases
If an alleged deficiency is raised by a defendant before trial or entry of a guilty plea, the charging document must state all facts essential to establish the charged offense; but if the information is not challenged until after a verdict or guilty plea, it will be liberally construed in favor of validity, and a technical deficiency that does not prejudice the defendant will not provide a basis to set the conviction aside.

[8] Criminal Law 110 ⚿1032(5)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1032 Indictment or Information
110k1032(5) k. Requisites and Sufficiency of Accusation. Most Cited Cases
If the challenge to a charging document is tardy, the charging document will be upheld on appeal unless it is so defective that it does not, by any fair or reasonable construction, charge an offense for which the defendant was convicted.

[9] Automobiles 48A ⚿357(13)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak357 Instructions
48Ak357(13) k. Homicide. Most Cited Cases
(Formerly 48Ak357)
Jury instructions were erroneous for not requiring finding that defendant was negligent before he could be found guilty of vehicular manslaughter; one instruction told jurors that if they found defendant caused victim's death by failing to maintain his lane of travel while driving, they were required to find defendant guilty of vehicular manslaughter, but another instruction implied that defendant would not be guilty if he was not negligent. I.C. § 18-4006, subd. 3(c).

[10] Criminal Law 110 ⚿822(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k822 Construction and Effect of Charge as a Whole
110k822(1) k. In General. Most Cited Cases
When reviewing jury instructions, appellate court asks whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law.

[11] Criminal Law 110 ⚿772(1)

110 Criminal Law

110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k772 Elements and Incidents of Offense, and Defenses in General
110k772(1) k. In General. Most Cited Cases
A trial court must charge the jury with all rules of law material to the determination of the defendant's guilt or innocence; therefore, the jury must be instructed on all elements of the charged offense.

[12] Criminal Law 110 ⚿778(5)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k778 Presumptions and Burden of Proof
110k778(5) k. Shifting Burden of Proof. Most Cited Cases
The omission of an element of the crime impermissibly lightens the prosecution's burden of proof.

[13] Criminal Law 110 ⚿1181.5(1)

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(1) k. In General. Most Cited Cases
When it is not possible to determine whether the jury reached its verdict on a correct or incorrect legal theory, an appellate court must vacate the conviction and remand the case for a new trial.

**411 Wiebe & Fouser, Caldwell, for appellant. Thomas A. Sullivan argued.
Hon. Lawrence G. Wasden, Attorney General; Melissa Nicole Moody, Deputy Attorney General, Boise, for respondent. Melissa Nicole Moody argued.
LANSING, Judge.
*264 Appellant Hugh S. McNair was convicted of misdemeanor vehicular manslaughter. The issues he raises on appeal, challenging the sufficiency of the criminal complaint and the jury instructions, require that we determine whether negligence on the part of the defendant is an element of vehicular manslaughter under Idaho Code § 18-4006(3)(c). We hold that it is and therefore vacate the judgment and remand for a new trial.

I.

BACKGROUND

On the evening of February 9, 2001, Hugh S. McNair was driving southbound on Highway 55 between McCall and Boise in wintry conditions. As he started to negotiate a curve, McNair's vehicle crossed into the opposite lane and collided head-on with another vehicle. Injuries from the collision resulted in the death of Reed Ostermeier, the passenger in the other vehicle. McNair was charged with misdemeanor vehicular manslaughter, I.C. § 18-4006(3)(c).

The second amended complaint, upon which McNair went to trial, alleged:
That the defendant, HUGH S. MCNAIR ... did, unlawfully but without malice kill Reed Elvin Ostermeier, a human being, by operating a motor vehicle ... in the commission of an unlawful act or acts, not amounting to a felony, without gross

negligence, to wit; the defendant was driving southbound at said location, carelessly, imprudently or inattentively by not paying attention *and/or* at a speed greater than is reasonable and prudent under the conditions or when approaching an intersection and curve or failing to observe special hazards that may be in existence by reasons of weather or highway conditions that caused him to apply his brakes, locking up his wheels *and/or* sliding his vehicle into the oncoming northbound lane striking the vehicle driven by Heidi M. Ostermeier killing Reed Elvin Ostermeier.
All of which is a misdemeanor in violation of Idaho Code 18-4006(3)(c), and ***265 **412** against the peace, power and dignity of the State of Idaho.

At trial, the defense theory was that McNair's vehicle hit a patch of ice on the road as he was entering a curve, which caused his vehicle to skid into the other lane despite McNair's exercise of due care. McNair was nevertheless found guilty by the jury.

McNair's conviction and sentence were affirmed by the district court on intermediate appeal. On further appeal to this Court, McNair argues that (1) the criminal complaint was jurisdictionally defective because it did not adequately allege that McNair was negligent; and (2) the magistrate failed to properly instruct the jury that negligence is an element of vehicular manslaughter.[FN1] Both of these issues relate to the State's allegation that McNair caused the victim's death by "sliding his vehicle into the oncoming northbound lane striking the vehicle driven by Heidi Ostermeier...." Neither that portion of the amended complaint nor the related jury instruction expressly incorporated an element of negligence.

FN1. McNair also asserts that the magistrate imposed an excessive sentence, an issue that we do not reach.

II.

ANALYSIS

A. Negligence as an Element of Vehicular Manslaughter

[1] Both McNair's claim that the complaint was jurisdictionally defective and his claim of error in the jury instructions require that we determine whether vehicular manslaughter may be a strict liability offense or requires some degree of negligence. Although the State conceded before the district court that negligence is an element of the offense, it now argues to the contrary.

On the date of the accident, vehicular manslaughter was defined in I.C. § 18-4006(3)(c) as follows:
Manslaughter is the unlawful killing of a human being without malice. It is of three (3) kinds:
....
3. Vehicular-in which the operation of a motor vehicle is a significant cause contributing to the death because of:
(a) the commission of an unlawful act, not amounting to a felony, with gross negligence; or
(b) the commission of a violation of section 18-8004 or 18-8006, Idaho Code; or
(c) the commission of an unlawful act, not amounting to a felony, without gross negligence.[FN2]

FN2. This statute was amended in 2002 to include a human embryo or fetus in the definition of a human being. 2002 Idaho Sess. Laws, ch. 350 § 2.

McNair was charged under subpart (c) which, on its face, does not include an element of negligence, but requires only an "unlawful act" that significantly contributes to the cause of death. The State contends that McNair committed an "unlawful act" when his vehicle crossed the center line, and even if it occurred without his negligence, he is guilty of vehicular manslaughter. [FN3] McNair argues that the Idaho courts have interpreted I.C. § 18-4006(3)(c) to include an element of negligence and that, if the statute is interpreted to create a strict liability offense, it would violate the constitutional right of due process.

FN3. Presumably, the unlawful act to which the State refers is a violation of I.C. § § 49-630, 49-631 and/or 49-637. Implicit in the State's argument is the proposition that these statutes prohibiting driving to the left of the center line create criminal liability even if the driver was exercising due care. That is a proposition that we need not address.

[2][3][4] When a court must engage in statutory construction, its duty is to ascertain and give effect to the intent of the legislature. *State v. Shanks*, 139 Idaho 152, 154, 75 P.3d 206, 208 (Ct.App.2003). In so doing, we look to the context of the statutory language in question and the public policy behind the statute. *Id.*; *State v. Cudd*, 137 Idaho 625, 627, 51 P.3d 439, 441 (Ct.App.2002). When an ambiguous statute is part of a larger statutory scheme, we not only focus upon the language of the ambiguous statute, but also look at other statutes relating to the same ***266 **413** subject matter and consider them together in order to discern legislative intent. *Shanks*, 139 Idaho at 154, 75 P.3d at 208; *State v. Paciorek*, 137 Idaho 629, 632, 51 P.3d 443, 446 (Ct.App.2002). Even when a statute is not ambiguous on its face, "judicial construction might nevertheless be required to harmonize the statute with other legislative enactments on the same subject." *Winter v. State*, 117 Idaho 103, 106, 785 P.2d 667, 670 (Ct.App.1989). We also are obligated to apply the doctrine of lenity, which requires courts to construe ambiguous criminal statutes in favor of the accused. *State v. Wees*, 138 Idaho 119, 124, 58 P.3d 103, 108 (Ct.App.2002); *State v. Dewey*, 131 Idaho 846, 848, 965 P.2d 206, 208 (Ct.App.1998).

An analysis of the mental element (if any) for vehicular manslaughter under § 18-4006(3)(c) requires consideration of not only the language of that statute, but also of two additional statutes. One of those is the excusable homicide statute, I.C. § 18-4012, which provides:

Homicide is excusable in the following cases:

1. When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat when no undue advantage is taken nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

The other is I.C. § 18-201(3), which provides:All persons are capable of committing crimes, except those belonging to the following classes:
....
3. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was not evil design, intention or culpable negligence.

In our view, § § 18-4012 and 18-201 collectively express a legislative intent that there is no criminal homicide when a death occurs through an accident and entirely without any negligence or other culpable behavior.

Although there are no previous Idaho decisions directly addressing the issue presented here, our interpretation of these statutes draws some support from two prior decisions, *State v. Long*, 91 Idaho 436, 423 P.2d 858 (1967), and *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct.App.1990). In *Long*, the defendant was charged with involuntary manslaughter in the operation of an automobile under then-existing I.C. § 18-4006(2), which was very similar to the present I.C. § 18-4006(3).[FN4] *Long* challenged the statute as being unconstitutionally vague. In the course of addressing that challenge, and ultimately upholding the validity of the statute, the Supreme Court stated:

> FN4. The statute under consideration in *Long* provided:
> Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:
> 1. Voluntary-....
> 2. Involuntary-...; or in the operation of a motor vehicle:
> (a) In the commission of an unlawful act, not amounting to a felony, with gross negligence; or,
> (b) In the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence; or,
> (c) In the commission of an unlawful act, not amounting to a felony, without gross negligence; or,
> (d) In the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

The legislature, classified the crime on the basis of whether it was committed "with gross negligence"-a felony, or "without gross negligence"-an indictable misdemeanor.[FN5] Such distinction, considered in harmony with the provisions of I.C. § 18-4012, indicates that the legislature intended that only a degree of negligence (as that term is defined by I.C. § 18-101, subp. 2) less than "gross negligence," but of a degree which would disclose acts, conduct, or omissions not embraced within the excusable homicide state, i.e., "when committed by accident and misfortune in doing ***267 **414** any lawful act by lawful means, with usual and ordinary caution, ..." would constitute a misdemeanor.

> FN5. The same classification exists under the present statutes. *See* I.C. § 18-4007(3).

Long, 91 Idaho at 442, 423 P.2d at 864.

In *Haxforth*, the defendant had attempted to pass another vehicle, at a time when there was traffic in the oncoming lane. This

maneuver, which violated I.C. § 49-634, caused the death of a passenger in an oncoming vehicle. The State charged Haxforth with misdemeanor vehicular manslaughter, alleging not gross negligence but ordinary negligence. Following his conviction, Haxforth brought a petition for post-conviction relief, asserting, among other things, that I.C. § 18-201 precluded his conviction because even if he was negligent, he was not "culpably negligent." In rejecting that argument, this Court stated:

> Idaho Code § 18-201 states that a person is incapable of committing a crime if he "committed the act ... through misfortune or by accident, when it appears that there was not evil design, intention or *culpable negligence.*" (Emphasis added.) In *State v. Long*, 91 Idaho 436, 443, 423 P.2d 858, 865 (1967) our Supreme Court determined that the reference to "culpable negligence" is simply a reiteration of the excusable homicide standard under I.C. § 18-4012. It does not preclude imposition of criminal responsibility for negligence under the vehicular manslaughter statute. In essence, we understand *Long* to mean that negligence in committing an unlawful act, resulting in death, is "culpable negligence." Therefore, we conclude that Haxforth is not shielded by I.C. § 18-201.

Haxforth, 117 Idaho at 191, 786 P.2d at 582. It is implicit in these comments that commission of an act (even if it is unlawful under a strict liability statute) that involves no negligence at all would not satisfy the "culpable negligence" requirement of section 18-201 and therefore would not support a conviction for vehicular manslaughter.

The State incorrectly contends that the above passage shows that the *Haxforth* Court "interpreted any negligence requirement in the misdemeanor manslaughter statute to require nothing more than an unlawful act resulting in death." To the contrary, *Haxforth* says that, "*negligence* in committing an unlawful act" is culpable negligence. *Id.* (emphasis added).

Having concluded that Idaho law requires a culpable mental state of at least simple negligence before an individual may be convicted of vehicular manslaughter, we must determine whether the criminal complaint and the jury instructions in McNair's case adequately addressed this element of the offense. [FN6]

> FN6. Because we conclude that I.C. § § 18-201 and 18-4012 together require a culpable mental state of at least negligence, we need not address McNair's argument that such a requirement is mandated by the constitutional guarantee of due process.

B. The Criminal Complaint Was Not Jurisdictionally Defective

[5] McNair contends that the criminal complaint was insufficient to confer jurisdiction upon the court because it did not allege that his failure to maintain his lane of travel was the product of a negligent act or omission and, hence, did not allege all of the elements of vehicular manslaughter. The State contends that because the charge was a misdemeanor, it was not necessary to allege the specific facts of the offense. Without reaching the State's contention, we conclude that the complaint was not jurisdictionally defective.

The second amended complaint identified at least three alternative unlawful acts which

allegedly were committed by McNair and caused the death of the victim: (1) driving "carelessly, imprudently or inattentively" and/or (2) driving "at a speed greater than is reasonable and prudent under the conditions" and/or (3) "sliding his vehicle into the oncoming northbound lane." McNair does not challenge the sufficiency of the allegations with respect to the first two of these but contends that, because the acts are pleaded in the alternative, the omission of any allegation of negligence with respect to the third act of sliding into the oncoming lane makes the complaint insufficient to allege an offense and, hence, insufficient to confer jurisdiction on the court.

**415 268[7][8] A charging document will be deemed so flawed that it fails to confer jurisdiction on the court if the facts alleged are not made criminal by statute or if the document fails to state facts essential to establish the offense charged. *State v. Mayer*, 139 Idaho 643, 646, 84 P.3d 579, 582 (Ct.App.2004); *State v. Byington*, 135 Idaho 621, 21 P.3d 943 (Ct.App.2001). If an alleged deficiency is raised by a defendant before trial or entry of a guilty plea, the charging document must state all facts essential to establish the charged offense, *State v. Halbesleben*, 139 Idaho 165, 168, 75 P.3d 219, 222 (Ct.App.2003); *Byington*, 135 Idaho at 623, 21 P.3d at 945; but if the information is not challenged until after a verdict or guilty plea, "it will be liberally construed in favor of validity, and a technical deficiency that does not prejudice the defendant will not provide a basis to set the conviction aside." *Halbesleben*, 139 Idaho at 168, 75 P.3d at 222; *State v. Cahoon*, 116 Idaho 399, 400, 775 P.2d 1241, 1242 (1989); *State v. Robran*, 119 Idaho 285, 287, 805 P.2d 491, 493 (Ct.App.1991). Thus, if the challenge is tardy, the charging document will be upheld on appeal "unless it is so defective that it does not, by any fair or reasonable construction, charge an offense for which the defendant was convicted." *Halbesleben*, 139 Idaho at 168, 75 P.3d at 222. *See also Robran*, 119 Idaho at 287, 805 P.2d at 493.

Because the liberality we use in construing the complaint depends upon the timing of McNair's claim that it was jurisdictionally defective, it is necessary to review the relevant procedural history. The State's original complaint was amended, and the first amended complaint charged that on the date in question McNair "did, unlawfully but without malice kill Reed Elvin Ostermeier, a human being, by operating a motor vehicle ... in the commission of an unlawful act or acts, not amounting to a felony, without gross negligence, wherein, his vehicle went into the oncoming lane of traffic and struck the [Ostermeier] vehicle...." Shortly afterward, McNair moved to dismiss this amended complaint, contending that the conduct alleged to have constituted the underlying "unlawful act" was consistent with lawful operation of a motor vehicle. The State then filed the second amended complaint that we have heretofore quoted. The court minutes from the hearing on the motion to dismiss show that defense counsel told the court that he was satisfied that the second amended complaint resolved the objections raised in the motion, and the magistrate therefore found the motion to dismiss to be moot. Now, following McNair's conviction, he contends for the first time that the second amended complaint was jurisdictionally defective. We therefore exercise "considerable leeway to imply the necessary allegations," *Robran*, 119 Idaho at 287, 805 P.2d at 493, and will find the pleading insufficient to confer jurisdiction only if it

does not "by any fair or reasonable construction, charge the offense for which the defendant was convicted." *Halbesleben*, 139 Idaho at 168, 75 P.3d at 222.

McNair points out that, "sliding his vehicle into the oncoming northbound lane" is alleged as an independent, alternative unlawful act upon which he could be convicted for vehicular manslaughter. He argues that because the phrase did not include an allegation that he was negligent, this alternate theory of criminal liability was invalid, and that the entire complaint was therefore insufficient to allege the offense.

Having concluded above that a culpable mental state of at least negligence is required under I.C. § 18-4006(3)(c), we agree with McNair that the third alternative, "*and/or* sliding his vehicle into the oncoming northbound lane," was defective for failure to allege any negligence or other culpable mental state. It does not follow, however, that the amended complaint is jurisdictionally insufficient merely because the third alternative is infirm. Both the first and second alternatives made clear references to negligence, by using such words and phrases as, "carelessly," "imprudently," "inattentively," "not paying attention," and "at a speed greater than is reasonable and prudent under the conditions." [FN7] McNair does not challenge***269 **416** the sufficiency of the first and second alternatives. Because the first two alternatives were sufficient to describe an offense, we conclude that the second amended complaint as a whole was adequate to confer jurisdiction on the court.

FN7. The first alternative was apparently referring to inattentive driving, I.C. § 49-1401(3), as the underlying unlawful act and the second alternative was apparently referring to a violation of Idaho's basic speed rule, I.C. § 49-654(1).

C. Jury Instructions

[9] We next address McNair's contention that the jury instructions were erroneous because they did not require a finding that McNair was negligent before he could be found guilty of vehicular manslaughter under I.C. § 18-4006(3)(c).

[10][11][12] When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Alsanea*, 138 Idaho 733, 743, 69 P.3d 153, 163 (Ct.App.2003); *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct.App.1993). A trial court must charge the jury with all rules of law material to the determination of the defendant's guilt or innocence. I.C. § 19-2132(a); *State v. Fetterly*, 126 Idaho 475, 476, 886 P.2d 780, 781 (Ct.App.1994). Therefore, the jury must be instructed on all elements of the charged offense. *Halbesleben*, 139 Idaho at 168-69, 75 P.3d at 222-23; *State v. Crowe*, 135 Idaho 43, 47, 13 P.3d 1256, 1260 (Ct.App.2000). The omission of an element of the crime impermissibly lightens the prosecution's burden of proof. *Id.*

McNair contends that Instruction 3 required the jury to convict him even if it found that he was not negligent during the events leading up to the collision. That instruction said:

In order for the defendant to be guilty of Vehicular Manslaughter, the state must prove each of the following:
1. On or about February 9, 2001
2. in the state of Idaho

3. the defendant Hugh S. NcNair, while operating a motor vehicle committed one or more of the following acts;
(a) Inattentive driving; and/or
(b) Operating his motor vehicle in violation of Idaho's Basis Rule; and/or
(c) *Failing to maintain lane of travel.*
4. the defendant's operation of the motor vehicle in an unlawful manner caused the death of Reed Ostermeier:
You are further instructed that the unlawful act or acts are committed when one or all of the following occurred:
(a) The defendant drove his vehicle inattentively, carelessly or imprudently, in light of the circumstances then existing; and/or
(b) The defendant drove his motor vehicle in violation of Idaho's Basic Rule by driving at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing or by failing to drive at a safe and appropriate speed when approaching and going around a curve or by reason of weather or highway conditions; and/or
(c) The defendant, while driving his motor vehicle, failed to maintain his lane of travel.
If the state has failed to prove paragraphs 1 through 4, then you must find the defendant not guilty. If you unanimously find that the state has proven paragraphs 1 through 4, including at least one of the components of the unlawful act or acts as stated in 3(a) or (b) or (c) beyond a reasonable doubt, then you must find the defendant guilty of vehicular manslaughter.

This instruction, argues McNair, directed the jury to convict him based solely upon his failure to maintain his lane of travel, even if such failure was not a product of negligence. We agree. Application of parts 3(c) and 4(c) of the instruction required the jury to find McNair guilty if the collision was caused by McNair's failure to maintain his lane of travel, irrespective of negligence or other fault.

The State contends that any deficiency in Instruction 3 was cured by Instruction 3A, which was based upon I.C. § 18-201(3), and which stated:
All persons are capable of committing crimes, except those belonging to the following classes:
....
****417 *270** 3. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was not evil design, intention or culpable negligence.

We are not persuaded that this instruction cured the flaw in Instruction 3. The two instructions may well have led to jury confusion because they contradicted one another. Instruction 3 told the jurors that if they found McNair caused the victim's death by failing to maintain his lane of travel while driving, they "must find the defendant guilty of vehicular manslaughter." Instruction 3A, on the other hand, implied that McNair would not be guilty if he was not negligent. A juror who believed the defense theory, that McNair's vehicle left the lane of travel but that it was not due to any negligence on McNair's part, would be hard-pressed to determine what effect to give to Instruction 3A when Instruction 3 required a guilty verdict.

[13] The instructions did not preclude the jury from finding McNair guilty without any finding of negligence or other culpability. When it is not possible to determine whether the jury reached its verdict on a correct or incorrect legal theory, an appellate court must vacate the conviction and remand the case for a new trial. *State v. Luke*, 134

Idaho 294, 301, 1 P.3d 795, 802 (2000).

III.

CONCLUSION

The second amended complaint in this case was sufficient to allege an offense on two of the three legal theories alleged, and it therefore was sufficient to confer jurisdiction on the court. However, the jury instructions were deficient because they did not require the State to prove a culpable mental state amounting to at least simple negligence. Therefore, the judgment of conviction is vacated and the case remanded for a new trial.

Judge GUTIERREZ and Judge Pro Tem BEVAN concur.
Idaho App.,2005.
State v. McNair
141 Idaho 263, 108 P.3d 410

END OF DOCUMENT

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, COUNTY OF CANYON

SHANE MCKAY, Petitioner, vs. STATE OF IDAHO, Respondent.	No. CV-0700728 PETITIONER'S CROSS-MOTION FOR SUMMARY DISPOSITION

Shane McKay asks this Court, pursuant to I.C. 19-4906(c), to grant summary disposition in his favor. Mr. McKay is entitled to relief as a matter of law as set forth in the Petition for Post-Conviction Relief, the Memorandum in Support of Petition and the Respondent's Answer to the Petition.

Dated this 31st day of January 2007.

Dennis Benjamin
Attorney for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that on January 31 2007, I caused a true and correct copy of the foregoing document to be

X mailed

___ hand delivered

___ faxed

to: Gearld L. Wolff
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IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE MCKAY, Petitioner, vs. THE STATE OF IDAHO, Respondent.	CASE NO. CV07-728C **MEMORANDUM IN RESPONSE TO STATE'S MOTION FOR SUMMARY DISPOSITION AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

ORIGINAL

A. ***Introduction***

On January 19, 2007, Shane McKay filed a verified petition for post-conviction relief, motion for permission to conduct discovery and request that the Court take judicial notice of the underlying criminal record. On January 22, Mr. McKay filed a memorandum in support of his petition. Mr. McKay alleged that he received ineffective assistance of trial counsel as a result of Attorney Richard Harris's failure to object to jury instructions that omitted the elements of cause and intent, which were at issue in his trial. Mr. McKay further contended that he received

ineffective assistance of appellate counsel due to Attorney Jason Pintler's failure to raise the jury instruction error as an issue on appeal.

The state filed an answer, motion for summary dismissal and objection to discovery. Although the state concedes that the Court's instruction to the vehicular manslaughter jury instruction deviated from the pattern Idaho Criminal Jury Instructions (ICJI), it asserts that the deviation benefitted Mr. McKay. For the reasons set forth below, Mr. McKay asks the Court to deny the state's motion for summary dismissal and, instead, summarily grant Mr. McKay's petition for post-conviction relief.

B. ***Argument***

Idaho Code § 19-4906 authorizes summary disposition of a petition for post-conviction relief, pursuant to motion of a party or upon the court's own initiative. Summary dismissal is permissible only when the petitioner's evidence has raised no genuine issue of material fact, which, if resolved in his favor, would entitle him to the requested relief. *Downing v. State*, 136 Idaho 367, 371, 33 P.3d 841, 845 (Ct. App. 2001). If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

Mr. McKay has alleged that Attorney Harris failed to object to jury instructions that omitted the elements of intent and cause and that, because those elements were at issue, the jury's finding of guilt was not surely unattributable to the error. These facts, if resolved in Mr. McMay's favor, establish that trial counsel performed in an objectively unreasonable manner and that Mr. McKay was prejudiced by that performance.

Moreover, the jury instructions given in this case materially deviated from the pattern ICJI approved by the Idaho Supreme Court and were improper as a matter of law. The trial transcript[1] establishes that the elements of cause and intent were at issue and, thus, there could be no strategic purpose for trial counsel's decision to inform the Court he did not intend to request jury instructions addressing each element of the offense. Accordingly, Mr. McKay is entitled to summary disposition of his petition and the Court's order granting him relief.

1. The state is not entitled to summary dismissal

The state contends that it is entitled to summary dismissal because the "Court's instruction required the state to prove that the defendant's conduct was THE CAUSE of the death of Ted Cox," which benefitted Mr. McKay by placing a higher burden on the state than the pattern instruction. State's Motion p.2 (emphasis in original). However, a close reading of the Court's instruction establishes that it required the state to prove that Mr. McKay's "operation of the motor vehicle caused the death of Ted Cox." Instruction 201A, Exhibit 2 to Dennis Benjamin's Affidavit. Contrary to the state's assertion, this instruction neither required the jury to conclude that Mr. McKay's conduct was the only cause of the death nor that his conduct was a significant cause as required by law. Rather, the instruction permitted the jury to find Mr. McKay guilty based on its conclusion that Mr. McKay's conduct contributed to the death.

Moreover, as argued in Mr. McKay's memorandum in support of his post-conviction petition, the Court materially deviated from the ICJI by failing to clarify that Mr. McKay's

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[1] On January 19, 2007, Mr. McKay requested that the Court take judicial notice of the underlying criminal proceedings. *See* Attached Affidavit of Dennis Benjamin. For the convenience of Court and counsel, Mr. McKay has attached portions of the underlying criminal proceedings as exhibits to Mr. Benjamin's affidavit.

unlawful operation of his vehicle caused the death. Pursuant to the pattern instruction approved by the Idaho Supreme Court, a defendant is guilty if the state proves he committed an unlawful act by driving while under the influence of alcohol and "the defendant's operation of the motor vehicle *in such unlawful manner* was a *significant* cause contributing to the death." ICJI 703 (emphasis added). The Court's instruction in this case omitted the phrase "in such unlawful manner" and the word "significant." Thus, the jury was permitted to find Mr. McKay guilty if it concluded that he committed an unlawful act while operating a vehicle and the operation of the vehicle caused a death, regardless of whether it was the unlawful operation of the vehicle that caused the death.

Additionally, the trial transcript demonstrates that the elements of cause and intent were at issue. The deceased's blood alcohol level was .19. Exhibit 3 to Dennis Benjamin's Affidavit, p. 556, l. 18-23. There was evidence suggesting the motorcycle ridden by the deceased did not have an operational taillight at the time of the collision and was either stopped or traveling at a very slow speed. *See* Exhibit 3 to Dennis Benjamin's Affidavit, p. 629, l. 11 to p. 632, L. 23; p. 660, l. 11 to p. 664, l. 15; p. 704 to p. 16. During a jury instruction conference, Attorney Harris indicated that the element of cause presented a dilemma in the case but that he did not intend to request a jury instruction on cause. Exhibit 1 to Dennis Benjamin's Affidavit, p. 14-15, l. 25-4. It was objectively unreasonable to acknowledge that the element of cause was an issue in the case and then fail to object to the jury instructions that removed an essential element from the jury's consideration.

By failing to instruct that Mr. McKay's *unlawful* operation of the vehicle was a *significant* cause of the death, the Court's instruction relieved the state of its burden to prove beyond a reasonable doubt that Mr. McKay's unlawful conduct was the legal cause of the death. Although contributory negligence is not a defense to vehicular manslaughter, the deceased's conduct is relevant to whether the defendant's culpable conduct was the proximate cause of the death. *Miller v. State,* 513 S.E.2d 27, 30-31 (Ga. Ct. App. 1999). A motorist cannot yield to what he cannot see. *State v. Brown,* 603 N.W.2d 456, 461 (Neb. 1999). In *Miller,* the defendant struck a bicycle with his vehicle and an analysis of his blood revealed a BAC of .17. The trial court's re-instruction to the jury was reversible error because it could have left the jury with the mistaken notion that a defendant's intoxicated driving need only be a cause or an indirect cause of the death and could have deprived the defendant of his defense that, even if driving under the influence, that conduct was not the proximate cause of the death. *Miller,* 513 S.E.2d at 32.

Similarly, here, if the deceased's motorcycle was stopped or nearly stopped in the middle of the road during the night without a taillight, Mr. McKay could not have seen him regardless of whether he was driving under the influence. However, the jury instruction in this case allowed the jury to find him guilty if it concluded that he committed a DUI and the operation of his vehicle was a cause contributing to the death.

The state contends that, because Attorney Harris argued in closing that the element of cause had not been established, the jury instruction deviation from the pattern instructions did not harm Mr. McKay. However, Attorney Harris's closing argument reiterates that cause was at issue in the trial and that Mr. McKay was prejudiced by the erroneous jury instruction.

Moreover, the state's argument fails to take into account this Court's instruction to the jury which stated:

> You must follow all the rules *as I explain them to you.* You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. *If anyone states a rule or law different from any I tell you, it is my instruction that you must follow.*

Jury Instruction No. 201 (Emphasis added); Exhibit 2 to Dennis Benjamin's Affidavit.

The state asserts as an affirmative defense that the jury instruction issue could have been raised on direct appeal and that Mr. McKay is therefore precluded from addressing the issue in post-conviction. However, as argued in Mr. McKay's memorandum in support of his petition, the Idaho Court of Appeals held in *State v. Anderson*, ___ Idaho ___, ___ P.3d ____ (Ct. App. 2006), 2006 WL 2974049, *review granted* (Jan. 18, 2007), that a non-preserved jury instruction cannot be raised on appeal even where the instruction constituted fundamental error. Therefore, Attorney Harris's deficient performance further prejudiced Mr. McKay by denying him the opportunity to have the jury instruction reviewed by the Court of Appeals.

Alternatively, if *Anderson* is overturned by the Idaho Supreme Court on review, Mr. McKay's evidence demonstrates that he received ineffective assistance of appellate counsel. The jury instructions in this case relieved the state from its burden to prove every element of the offense beyond a reasonable doubt and, thus, violated Mr. McKay's right to due process of law. The error therefore rose to the level of fundamental error and could have been raised for the first time on appeal. "In the case of fundamental error in a criminal case the Supreme Court may consider the same even though no objection had been made at the time of trial." *See e.g., State v. Haggard*, 94 Idaho 249, 251, 486 P. 2d 260, 262 (1971).

The evidence submitted by Mr. McKay demonstrates that he received ineffective assistance of trial and appellate counsel. Accordingly, the Court should deny the state's motion for summary dismissal.

2. **Mr. McKay is entitled to summary disposition**

The Court's instruction on the element of cause varied from ICJI 703 by omitting the phrase "in such unlawful manner" and the word "significant." By deviating from the pattern instructions approved by the Idaho Supreme Court, the Court took considerable risk that the verdict finding Mr. McKay guilty would be overturned on appeal. *See State v. Merwin*, 131 Idaho 642, 647, 962 P.2d 1026, 1031 (1998). Nevertheless, Attorney Harris failed to object to the Court's erroneous instruction and Attorney Pintler failed to address the error on direct appeal. Counsels' respective performance was objectively unreasonable and constitutionally deficient as a matter of law.

Additionally, the trial transcript establishes that there was evidence, which could rationally lead to a finding in Mr. McKay's favor with respect to the element of cause. Therefore, the record in this case establishes that Mr. McKay received ineffective assistance of trial and appellate counsel. This Court should summarily grant Mr. McKay's petition for post-conviction relief.

C. ***Conclusion***

For the reasons set forth above, Mr. McKay asks the Court to deny the state's motion for summary dismissal and to grant his motion for summary disposition.

Respectfully submitted this 22nd day of March, 2007.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Dennis Benjamin
Attorney for Shane McKay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 22nd day of March 2007, I caused a true and correct copy of the foregoing document to be:

X mailed

____ faxed

____ hand delivered

to: Gearld L. Wolff
Canyon County Prosecuting Attorney
1115 Albany
Caldwell, ID 83605

Dennis Benjamin

dt

DAVID L. YOUNG
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
1115 Albany
Caldwell, Idaho 83605

Telephone: (208) 454-7391

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE MCKAY,

Defendant/Petitioner,

vs.

THE STATE OF IDAHO,

Plaintiff/Respondent.

CASE NO. CV0700728

NOTICE OF FILING OF EXHIBITS

COMES NOW, GEARLD L. WOLFF, Deputy Prosecuting Attorney, who gives the Court and Petitioner notice of the filing of two documentary exhibits to refute Petitioner's allegations of ineffective assistance of appellate counsel in Petitioner's Cross Motion for Summary Disposition. Said documents are certified copies from Supreme Court file number 31652, State v. Shane McKay, admissible under I.R.E. 803(8), 901, 902, 1001, 1003 and 1005. The documents are:

1. Defendant's Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof filed on April 3, 2006 by appellate counsel, Jason Pintler - Exhibit "A", and

2. The Order Granting Motion to Augment and to Suspend the Briefing Schedule, Exhibit "B".

DATED This 28th day of March, 2007.

GEARLD L. WOLFF
Deputy Prosecuting Attorney

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Hearing was personally delivered to the Defendant's attorney of record by mailing said copy to Dennis Benjamin, P.O. Box 2772, Boise, Idaho 83701, on or about the 28th day of March, 2007.

GEARLD L. WOLFF
Deputy Prosecuting Attorney

ORIGINAL

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

JASON C. PINTLER
Deputy Appellate Public Defender
I.S.B. # 6661
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

v.

SHANE MC KAY,

Defendant-Appellant.

CASE NO. 31652

MOTION TO AUGMENT AND TO SUSPEND THE BRIEFING SCHEDULE AND STATEMENT IN SUPPORT THEREOF

COMES NOW, defendant-appellant Shane McKay, through Jason C. Pintler, Deputy State Appellate Public Defender, and moves this Court pursuant to Idaho Appellate Rule 30, for an order augmenting the record in the above-entitled appeal with a copy of the following documents:

1) Instructions to the Jury (copy file-stamped Oct. 29, 2004, attached);
2) Defendant's Proposed Jury Instructions (copy file-stamped Oct. 22, 2004, attached);
3) Transcript of the opening arguments of counsel which occurred on Oct. 25, 2004, (a copy of which is not attached as it has not yet been prepared);
4) Transcript of the conference on jury instructions which occurred on Oct. 29, 2004, (a copy of which is not attached as it has not yet been prepared); and

5) Transcript of the closing arguments of counsel which occurred on Oct. 29, 2004, (a copy of which is not attached as it has not yet been prepared).

The appellant requests that the record be augmented to include the above named items because they are necessary to address issues to be raised on appeal. It appears that the district court's jury instruction 201A, the instruction giving the elements that the jury must find in order to find Mr. McKay guilty of vehicular manslaughter, are a misstatement of the law. Mr. McKay intends to raise as an issue on appeal the question of whether his right to due process was violated by the district court's jury instruction. In order to properly address this issue, it is necessary that this record include the jury instructions as given. In addition, in order to determine whether or not any claimed error was invited on the part of Mr. McKay, it is necessary for this Court to review his proposed jury instructions and the transcript of the jury instruction conference. Furthermore, in order to determine the extent to which the possible misstatement of the law affected Mr. McKay's right to a fair trial, it is necessary to review the opening and closing arguments of counsel.

"It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, ...and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34, 981 P.2d 754, 759 (Ct. App. 1999) (citation omitted). The requested items are currently missing from the record on appeal. Unless made part of the record, they will be presumed to support the district court's conclusion that the jury instructions given were appropriate. In order to overcome this presumption, Shane McKay requests that the requested items be made part of the record on appeal.

Additionally, Shane McKay moves this Court pursuant to I.A.R. 32(c), for an order suspending the briefing schedule in the above-entitled appeal until copies of the above requested transcripts are made a part of the record on appeal. Appellate counsel

is currently unable to properly review the merits of the case or write a brief on the merits without the ability to first review the requested items. Accordingly, counsel requests that briefing be suspended pending the Court and counsel's receipt of the requested transcripts. Thereafter, counsel can review the items and complete the brief.

Appellant further requests that the district court clerk forward proper copies of the requested items to the State Appellate Public Defender and the Idaho Attorney General's Office.

This motion is not filed to delay the appellate process and is made in good faith. It is the belief of the movant that a temporary suspension of the appellate process will ultimately expedite this case.

Counsel for the respondent has not been contacted in regard to the instant motion.

DATED this 3rd day of April, 2006.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of April, 2006, caused a true and correct copy of the attached MOTION TO AUGMENT AND TO SUSPEND THE BRIEFING SCHEDULE AND STATEMENT IN SUPPORT THEREOF to be hand delivered to Attorney General's mailbox at Supreme Court for:

KENNETH K. JORGENSEN
ATTORNEY AT LAW
DEPUTY ATTORNEY GENERAL
P.O. BOX 83720
BOISE, ID 83720-0010

EVAN A. SMITH
Legal Secretary

JCP/eas

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-Respondent, v. SHANE MC KAY, Defendant-Appellant.	)	ORDER GRANTING MOTION TO AUGMENT AND TO SUSPEND THE BRIEFING SCHEDULE NO. 31652

A MOTION TO AUGMENT AND TO SUSPEND THE BRIEFING SCHEDULE AND STATEMENT IN SUPPORT THEREOF with attachments was filed by counsel for Appellant on April 3, 2006; therefore, good cause appearing,

IT IS HEREBY ORDERED that Appellant's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the District Court Reporter shall prepare and lodge the transcripts listed below with the District Court Clerk within twenty-eight (28) days from the date of this Order, and the District Court Clerk shall immediately serve counsel and file the transcripts with this Court. Any corrections shall be filed with this Court as provided by I.A.R. 30.1:

1. Transcript of the opening arguments of counsel held on October 25, 2004.
2. Transcript of the conference on jury instructions held on October 29, 2004.
3. Transcript of the closing arguments of counsel held on October 29, 2004.

IT IS FURTHER ORDERED that the appeal record shall include the documents listed below, copies of which were submitted with the Motion, as EXHIBITS:

1. Instructions to the Jury, copy file-stamped October 29, 2004
2. Defendant's Proposed Jury Instructions, copy file-stamped October 22, 2004.

IT IS FURTHER ORDERED that Appellant's MOTION TO SUSPEND THE BRIEFING SCHEDULE be, and hereby is, GRANTED, and the proceedings in this appeal are SUSPENDED until the transcripts listed above are filed with this Court, at which time the due date for filing Appellant's Brief shall be reset which shall be thirty-five (35) days thereafter.

Exhibit B

entered on ATS DB

DATED this 26th day of April, 2006.

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Reporter

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order/documents entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 3/29/07

STEPHEN W. KENYON
Clerk

By: Kimberly Growe
Deputy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PRESIDING: **REANE J. HOFF** DATE: May 21, 2007

SHANE MCKAY,	)	COURT MINUTE
	)	
Petitioner,	)	CASE NO: CV2007-728*C
	)	
vs.	)	TIME: 3:30 P.M.
	)	
THE STATE OF IDAHO,	)	REPORTED BY: Carole Walden
	)	
Respondent	)	DCRT3 (4:10-5:00)
	)	

This having been the time heretofore set for **motion for summary disposition and motion for summary judgment** in the above entitled matter, the petitioner was not personally present in court, but was represented by counsel, Mr. Dennis Benjamin and the State was represented by counsel Mr. Gearld L. Wolff, Deputy Prosecuting Attorney for Canyon County.

The Court reviewed prior proceedings, noted the State's motion for summary disposition, the petitioner's motion for summary judgment and instructed the State to proceed with oral argument.

Mr. Wolff presented argument to the Court in support of the motion for summary disposition.

Mr. Benjamin responded with argument, requested the Court grant summary disposition as to the petition and deny the motion on behalf of the State.

Mr. Wolff responded with further argument.

Mr. Benjamin concluded with further argument.

The Court announced Findings of Fact and Conclusions of Law. The Court found that there was no genuine issue of material fact, the Petition only raised a question of law, therefore, summary disposition is appropriate. The Court found no error in the failure of Mr. Harris to object to the instruction and if there was an error it was to the benefit of the defendant, so it could not be said on the narrow issue that counsel was ineffective. The Court **denied the petition for post conviction relief and granted the State's *motion for summary dismissal.***

The Court instructed the State to prepare an order denying post conviction and granting summary dismissal and the Court would hold the same for five (5) days for any objection to the verbiage. The Court further instructed the Court Reporter to prepare a transcript of the proceedings for appeal purposes.

- - - -

J. Maund
Deputy Clerk

Dennis Benjamin
ISBA# 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
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P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for the Petitioner

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, COUNTY OF CANYON

SHANE MCKAY, Petitioner, vs. STATE OF IDAHO, Respondent.	No. CV-0700728 *PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT* ORIGINAL

Shane McKay asks this Court for an Order Granting Relief from Judgment. This motion is made pursuant to I.R.C.P. 60(b)(3) because there has been an unintentional misrepresentation of fact by an adverse party.

During the motion hearing on May 21, 2007, the Respondent represented to the Court that the analysis of Ted Cox's blood had been misinterpreted at the time of the criminal trial and that his blood alcohol concentration was actually .00 and not .19 as previously believed. That, however, is not the case. In fact, the ".19 RESULT" noted on the Mercy Medical Center Laboratory Report could mean either .19 milligrams per deciliter of blood was found in Mr. Cox's blood (in which case the BAC would be .00) or it could mean that .19 grams per deciliter

of blood was found (in which case the BAC would be .19). Further, during the deposition of Dr. Thomas M. Donndelinger, M.D., the Director of Laboratory at Mercy Medical Center, taken in the case of *Sorensen and Cox v. McKay, et al.*, Canyon Co. CV-04-10959, he stated that he had spoken to Kathy Higgins, the technician who performed the blood test and the one who made the ".19 RESULT" notation on the lab report. Ms. Higgins told Dr. Donndelinger that the .19 result meant .19% blood alcohol concentration, not .00. Deposition of Thomas M. Donndelinger, pg. 34, ln. 14 - pg. 35, ln. 14.

A true and correct copy of Dr. Donndelinger's deposition is attached as Exhibit A hereto.

Respectfully submitted this 31st day of May 2007.

Dennis Benjamin
Attorney for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that on May 31 2007, I caused a true and correct copy of the foregoing document to be

X mailed

___ hand delivered

___ faxed

to: Gearld L. Wolff
Deputy Prosecuting Attorney
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

Dennis Benjamin

MAY 24 2007

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARY KATHRYN SORENSEN and PATRICIA COX, Plaintiffs, vs. SHANE EDWARD McKAY, DAVID McKAY and VIVIAN McKAY, Defendants.	Case No. CV 04-10959

DEPOSITION OF THOMAS M. DONNDELINGER

November 7, 2006

Nampa, Idaho

Reported By:
Andrea L. Chandler, RPR

COPY

ASSOCIATED REPORTING, INC.

000246

1618 W. Jefferson ▼ Boise Idaho ▼ 83702
(800) 588-3370 ▼ (208) 343-4004 ▼ (208) 343-4002 Fax

EXHIBIT A

DEPOSITION OF THOMAS M. DONNDELINGER

BE IT REMEMBERED that the deposition of THOMAS M. DONNDELINGER was taken by the Defendants at Mercy Medical Center, located at 1512 12th Avenue Road, Nampa, Idaho, before Associated Reporting, Inc., Andrea L. Chandler, Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Tuesday, the 7th day of November, 2006, commencing at the hour of 1:15 p.m. in the above-entitled matter.

APPEARANCES:

For the Plaintiffs:
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I N D E X

E X A M I N A T I O N

E X H I B I T S

PROCEEDINGS

(Deposition Exhibit Nos. 1 through 7 were marked for identification.)

THOMAS M. DONNDELINGER,
a witness having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MS. BRIZEE:

Q. Doctor, would you please state your full name and your business address for our record.

A. Thomas M. Donndelinger, D-O-N-N-D-E-L-I-N-G-E-R, 1512 12th Avenue Road, Nampa, Idaho 83686.

MS. BRIZEE: And, Counsel, can we have the same stipulation, that this deposition is taken pursuant to proper notice, and that it will be taken in accordance with the Idaho Rules of Civil Procedure?

MR. HELFRICH: Yes.

Q. (BY MS. BRIZEE) Dr. Donndelinger, what is your official title here at Mercy Medical Center?

A. Director of Laboratory.

Q. And how long have you been here?

A. Since 1973.

Q. How long have you been the director?

A. Intermittently most of the time. But it gets rotated between me and Dr. Kronz. And before he was here, Dr. Druler.

Q. So for how long -- you're the medical director right now; correct?

A. Right.

Q. For how long have you been the medical director, this time around?

A. I think it probably alters every year.

Q. Oh, does it?

A. Yeah.

Q. Would you have been the medical director back in October of 2003?

A. Let's see. Well, probably not. I would be -- then the title would be pathologist.

Q. And you are a pathologist; correct?

A. Yes.

Q. I'm going to you hand you what's been marked as Deposition Exhibit No. 1, and it's just a notice of your deposition. We talked briefly before we started the deposition this afternoon about whether there were any additional documents you had for us.

I just like to mark these and show these to people to make sure they have an understanding that the notice of deposition was duces tecum, which means to bring all documents --

A. Yes.

Q. -- with them.

A. Yes.

Q. And have you brought with you today all documentation relative to this October 5, 2003 blood draw on Ted Cox?

A. That's correct.

Q. Let me ask you before we get into the documents, so that I can have an understanding of what we're talking about once we get there: Can you walk me through what happens when a blood specimen comes to your lab for an alcohol evaluation?

Just walk me through the steps of what happens.

A. Okay. The blood specimen is obtained from the individual. The individual is identified on a label on the tube. There are requests that are generated into finding what laboratory tests are to be done on the sample. And from that accession, it goes into the appropriate department in the laboratory, in this case, chemistry.

And the sample is centrifuged; the serum is separated and the designated amount of blood serum is added to the automated analyzer; and then the analyzer has a menu to select which particular test out of that menu is desired; the analyzer then performs the test; displays the result on a screen, and also prints it out.

Q. Let me go back through some of this -- because I've never seen this process happen -- to make sure I have a good working understanding of how this works.

So the specimen comes to the lab, and it's already identified, the identification is already on the tube; correct?

A. Yes.

Q. And, in fact, will the lab accept a specimen that does not have some identification on the tube?

A. No.

Q. What identification does the lab require in order to accept the specimen?

A. The name, the date, the initials of the individual drawing the tube.

Q. Actually, I need to ask you this question. I'm going to ask it now while I'm thinking about it, otherwise I might forget.

As far as the Ted Cox blood specimen, do we have any of that specimen here at the facility, or has

it been discarded?
A. We no longer have any of the specimen left, and after the storage cycle, it's discarded -- incinerated.
Q. (BY MS. BRIZEE) So there is some period for which these specimens are stored, is what you're saying, and then they are incinerated?
A. Yes.
Q. For what period are these specimens typically stored?
A. I'd have to re-check. It's in the range of a week.
Q. So it's not something that's stored for months?
A. No.
Q. I'm assuming if somebody requests that you store it longer, you have that capability?
A. Yes.
Q. Have we looked to see if we have any of this specimen still stored with us?
A. Yes.
Q. And we do not?
A. No.
Q. When the specimen comes in, you said there are some requests that are generated, and those requests

would be what testing is being requested on the specimen?
A. From the ordering end. Who is ordering it, usually a physician, and what tests are they requesting.
Q. Have we looked for an order sheet on this particular specimen?
A. No -- I mean, yes. We no longer have records that go back that far.
Q. Okay. Does the specimen get logged in any kind of a log book?
A. With a written record, no. These are all entered in the laboratory computer or information system.
Q. Then you said -- I believe you said after the accession -- is that the same as after receipt?
A. Yes.
Q. -- the specimen is given to the appropriate department for analysis, which I'm assuming depends on what tests have been ordered; is that correct?
A. That's correct.
Q. And in this case, for a blood alcohol analysis, it would go to chemistry?
A. Right.
Q. In this case -- Dr. Donndelinger, I'm going to hand you what's been marked as Deposition Exhibit No. 3,

and I'm going to hand you what's been marked as Exhibit 4.
Just to clarify, because there is, I believe, an indication in our record that -- from the coroner's report that both urine and blood were drawn on Mr. Cox. And I'd like to know -- you're going to have to educate me here -- what number is this, Doctor? Number 3.
A. 3 and 4.
Q. Is 3 an analysis of blood or urine or both?
A. It's an analysis of urine.
Q. But the analysis of the urine did not include any kind of alcohol analysis; correct?
A. That's correct.
MR. HELFRICH: Excuse me, Counsel, could I see 3?
MS. BRIZEE: Sure.
MR. HELFRICH: Thanks.
Q. (BY MS. BRIZEE) Let's go back to 3 for just a second, and then we can be done with it.
Is there any indication on 3 that Mr. Cox had any drugs or medication in his urine?
A. No, there's not.
Q. So let's just talk from here on out on the blood specimen. I just wanted to clarify that there were two specimens, but we're really here to talk about the blood specimen.

So the blood specimen would go to chemistry?
A. That's correct.
Q. And then it would be centrifuged. And the purpose of centrifuging is to separate the serum?
A. From the cells.
Q. From the cells. Okay.
So in centrifuging the serum is separated, and then I believe you said a designated amount is put into the automated analyzer?
A. Yes.
Q. And who designates the amount, or is that really an issue here at all?
A. It's not. The amount isn't an issue. The actual measurement of what volume is being analyzed is handled automatically by the instrument. You have to load a reservoir in the instrument with the patient's name or number identification. So a supply of the patient's serum sample is put into the -- into the instrument.
Q. And the instrument being the automated analyzer?
A. Yes.
Q. Are all automated analyzers the same, or is that the brand name? I mean --
A. No. There are different vendors for automated

chemistry equipment.
Q. Do you have the same analyzer today in use in your lab that you would have in October of '03?
A. Yes.
Q. What kind of analyzer is it?
A. I'd have to re-check the vendor's name.
Q. Okay. Let me ask you this question: Does this lab -- I'm assuming this lab does analyze blood for blood alcohol levels, other than for the county coroner?
A. Yes.
Q. In what other instances or context does this lab analyze blood for blood alcohol levels?
A. Most of those requests come from the emergency room physicians.
Q. But a blood specimen from the county coroner would undergo the same process as a blood specimen for the ER for blood alcohol analysis; correct?
A. Yes.
Q. All right. Let's go back to the process. So the serum is separated, a designated amount is put into the automated analyzer equipment -- and I guess when we're done, maybe we can have you get the name of that --
A. I can get the name.
Q. -- for us.

And then you indicated there is a menu to select which test is to be performed; correct?
A. That's correct.
Q. Now, we've never worked in a lab before, but are there different blood alcohol level tests you can choose, or are you choosing to have a blood alcohol test performed?
A. Choosing a blood alcohol test as a category of analysis, as opposed to a number of different chemical determinations that can be performed.
Q. And then the analyzer -- and then the equipment runs the test; correct?
A. That's correct.
Q. And then -- and I have a vision that the blood specimen is actually in the machine when it's being tested; is that accurate?
A. That's correct.
Q. And then the equipment actually displays the results on a screen. Does that mean a computer screen?
A. Computer screen.
Q. Is the computer part of the automated analyzer?
A. Yes.
Q. And then you press a button, and it prints out?

A. It prints out, and then the results also get transferred to the data storage part of the laboratory computer -- laboratory information system.
Q. So once you have printed out the results, does that mean it's no longer on that particular computer that's attached to the automated analyzer? Are the results stored on that system?
A. No. The results are transferred to the laboratory information system, and they are stored there in accessible and archival form.
Q. In this particular instance related to Ted Cox's -- the analysis of Ted Cox's blood for a blood alcohol level -- and I'm going to hand you what's -- well, let's go -- I was going to hand you Deposition Exhibit No. 2, but I think your Deposition Exhibit No. 7 is more accurate.
Actually, before we go there. When a coroner -- when the county coroner brings you a specimen, is Exhibit 4 then what is provided to the county coroner?
A. Yes.
Q. However, you have -- and what is that called? What do you call that in the lab, Exhibit 4?
A. Laboratory report.
Q. What is the difference between -- is there a different name for No. 7 then -- what's been marked as

Deposition Exhibit No. 7, which is what you produced to us today; correct?
A. That's correct.
Q. And here's what I'm getting at: We've had Exhibit 4 from one source or another for some period of time. Exhibit No. 7 is a fairly new document that we have not had -- well, this one in particular have not had, but for just a few minutes, since you gave it to us.
But Mr. Helfrich's version we've not had. Is this something -- it looks different. What do you call this document?
A. Well, this document is the laboratory report on Ted Cox retrieved out of archive in the laboratory information system. I believe the other one is a copy of the report, probably, the coroner's office has.
I don't -- I don't know where -- you know, offhand, I don't know where you've got that. But in terms of formatting, when these things are printed out, there is a slightly different format the first time the report is generated for the -- for the receiver or customer.
Q. Well, and that was going to be my next question. Does No. 4 appear to be the type of report that would be printed for the ordering party?

A. Yes.
MR. HELFRICH: And incidentally, I don't know if this helps clarify it or not, but I notice it says, physician or doctor report on this particular exhibit.
THE WITNESS: That would probably reflect the coroner as the recipient of that.
Q. (BY MS. BRIZEE) Well, let me ask you this question -- Mr. Helfrich makes a good point.
Is there anything in these records -- I'm assuming somewhere in these records there would be an indication of who ordered the report; right, or who ordered the specimen to be analyzed, or would that just be on the order sheet?
A. Well, let's see the official one. Oh, the -- from this, the ordering physician is listed as me. This is -- a lot of the submissions by the coroner's office are entered under my name so that they can be accepted by the information system.
You have to be in a position to be qualified to make an order. The coroner is not -- is not going to be somebody recognized, offhand, as qualified to order a test. So that's why we've done it this way. These are the constraints of the information system.
Q. And, doctor, I know from your letter of November 1st and its attachment, that you -- some

questions have been raised about Deposition Exhibit No. 7, also, what I'm going to refer to as Deposition Exhibit No. 2, because that's the document that we've always had. And I know you have done some checking into some matters surrounding the analysis of this blood specimen.
I also know that you've talked to either Mr. Helfrich or someone from his office and myself. And what I want to ask you, before we get into what you have looked for, and what you have found relative to this specimen is: Has any conversation with any attorney influenced what you did to check into the issues surrounding this blood specimen?
A. No. Absolutely not.
Q. So let's look at this report. And let me just start with the issues that have been -- well, actually, let's go through, and I'm going to have you explain some of this stuff at the top.
It looks to me from these print outs -- I'm looking at 2, you're looking at 7, I believe they have the same information -- that this specimen came in, it was entered at 0544. Is that the time that the specimen is accepted -- well, no. Order 0542?
A. It was entered on the 5th of October, 1903 -- excuse me, 2003.

Q. That would go back to your earlier comment to Mr. Helfrich about the ice age, I believe?
A. That's right.
Q. It says order for 0542, so I'm assuming that's when the order was given to run an analysis on this specimen; is that correct?
A. That's correct.
Q. It has a collection time of 0542, but we know the coroner collected this specimen, so I'm assuming that collection time is not -- or may not be accurate?
A. That's correct.
Q. But, certainly, you have a received time of 0542, which, to me, indicates that's when the specimen came to the lab?
A. That's when it was -- would be when it was entered into the information system.
Q. What does, "STATUS: COMP," mean?
A. I don't know offhand.
Q. There's another status indication up here; "STATUS: REG REF," what does that mean?
A. Regular referral. I think the status comp may be complete. I can't be certain of that. I would have to inquire.
Q. Up in the upper right-hand corner is a run date. For instance, your No. 7 has a run date of

11/7/06, and a time, which, to me, indicates the time that this actual report was printed; is that accurate? I'm looking up here in this --
A. I know. I'm just --
Q. And if you don't know, that's fine.
A. I don't know.
Q. Well, at least the one that you've produced to us today, Exhibit 7, you've printed out today; correct?
A. Yes. Is that the same as --
Q. This one was printed out, I believe -- if the run date is the print date -- 8-30-06, I believe at the request of Mr. Helfrich's office.
A. All right. That would compare.
Q. Down here in this section there's an entered time and date entered by lab. And I believe K. Higgins would be Kathy Higgins?
A. Yes.
Q. Now, would she be the lab employee who would have run this blood analysis then?
A. To the best of my knowledge, yes.
Q. Have you talked to Kathy Higgins?
A. Yes.
Q. And does she recall running this particular specimen or anything that happened with this specimen?
A. Not specifically.

Q. When you say, "not specifically," that means there may be some recollection, generally.
Can you tell us what she told you?
A. That's in -- you know, in reference to trying to understand a corrected laboratory report to see if she remembered anything. And so the response was, she didn't remember specifically running this individual test.
However, you know, she did recall, at the time, there was a -- a problem with the results in the laboratory system.
Q. What exactly did she tell you about these problems, generally?
A. When I questioned her on this, she said this was an interface problem.
Q. And what does that mean?
A. The transfer of the data from the instrument has to go through an interface, so the same language and data comes out the other end into the laboratory information system, since they are programmed differently.
Q. And let me go back to the process that we had talked about.
Is that interface with the computer -- that's part of the analysis equipment that has a computer

screen where the results are displayed, or is that a problem with the transfer of data to the lab's storage computer?
A. She would be referring to the transfer of data to the laboratory storage system.
Q. Okay. So it would be -- okay.
So as far as we know, the computer equipment that's part of the analysis equipment was operating appropriately?
A. As far as we know.
Q. Is this document, Exhibit No. 4, printed from the computer that's attached to the analysis equipment, or is it printed from the laboratory's data storage equipment?
A. This one would be printed from the data storage through the laboratory information system.
Q. Does the equipment itself -- the analysis equipment with its own computer display screen, does anything get printed from that?
A. You can get a print out of a strip with the patient's name, and the calculations, and the results.
Q. And do we have that strip?
A. No. They are not archived this long.
Q. So when would that strip have -- how long would that strip have been around?

A. You know, it's in months or years. I don't know. That information is possible, but it's no longer available.
Q. You've looked for it?
A. Yes.
Q. But we don't know when exactly it --
A. It can be -- there are schedules for going through these work -- you know, these individual data records of the instruments, and they're scheduled for periodic purging, depending on how old they are. Offhand, I don't know the length of time, but they are under regulatory constraints.
Q. Who is in charge of determining when those things are purged?
A. Well, by -- the regulations are, you know, through the federal government, and then through the regulations that govern our inspections, and then we set up schedules here to -- it's in part of our laboratory procedures to have them eliminated after the required storage period is up.
Q. And I meant, is there like a person in the lab who's in charge of storage on, 2001 is up, go shred these, or how does it actually work?
A. To my knowledge, there's not a specific individual on that. I could check, but I don't -- as

far as I know, there's nobody in charge of the -- you know, the notes.
They are on schedule, and they're stored in containers. And as they're dated for, you know, the periods of time when they're done, and then the period of time for expiration, you know, periodically those containers are gone through, and then they're shredded.
Q. Thank you. That explained how these things are stored. Because I suspect if we go out in the lab or to some storage area, you would have strips going back for some period of time?
A. Yes.
Q. But you don't have strips going back to October of 2003?
A. No. That was checked. No, we don't.
Q. How far back do you guys go right now?
A. I'll have to check on those. Those are by regulation.
Q. You must not keep them for very long?
A. No. You know, it's probably in terms of a year.
Q. What does this date up here, last reported mean? What is that referring to?
A. You know, since it looks like today's date, it was the last time it was -- there was an inquiry in the

computer.
Q. Well, my Exhibit No. 2 has a last reported date of 10-30-04.
A. So that was printed out at a different time. That's the date when it was printed out of the information system.
Q. The last date it would have been printed before this one was printed?
A. Yeah. That's the date that was retrieved out of the archive.
Q. Do we have any way of trying to figure out who requested the 10-30-04 print out?
A. Not to my knowledge.
Q. What does, "LAST ACT:" indicate?
A. I'm going to -- I think that is today's date. It's the last time this was requested.
Q. Oh, is yours today's date?
A. Yes. 11/07/06. I just had this printed out, because I had a copy in my office.
Q. Oh, no. I'm looking at, "LAST ACT: 10/05/03-0548."
A. Oh, that one?
Q. Yeah.
A. That was -- you know, I assume it's the previous -- last acquisition, or, you know -- I mean,

there are people who can tell you what that means, but it may be the last time it was printed out. And I think that -- does that match yours?
Q. It does.
A. Okay. So it's probably a record of the times in the past it was accessed for reprinting or rereporting.
Q. What about this review date of 10/06/03 at 0739? And then it says, "LAB.ARE," or lab something ARE. What does that mean?
A. That was when the results were --oh, let's see. That was probably when the results were last reviewed.
Q. Okay.
A. They have to be -- before transfer from the automated equipment to archives, they have to be reviewed.
Q. By a supervisor?
A. No. Well, that's usually by the person performing it.
Q. What does this information down here mean, 10/05/03-0545, 0545, 0547, 0548, and then a 10-06 0500, and then it says, ".BROADCAST."
A. I can't address that. I don't know. That's --

Q. Who would be able to address that for us, if we needed someone?
A. Probably somebody in the information technology department, or probably the person in the laboratory responsible for overseeing the computer.
Q. And then down here we have the results; correct?
A. That's correct.
Q. Under results. And we have a 10/05/03-0546, and we have a .19 result?
A. That's correct.
Q. And then we have, alcohol previously reported as 0.00 percent?
A. That's correct.
Q. And, again, you have done some investigation into -- well, then we have this edited comment by Kathy Higgins.
A. Yes.
Q. Let me ask you this: Did Kathy Higgins have any recollection of why -- well, actually, I'm going to take a step back.
What does this mean when somebody edits, where there's this edited by statement on a report?
A. That would indicate they're correcting a previous result.

Q. Does the previous -- is this the previous result then that she would be correcting, is the 0.00 percent?
A. That's correct.
Q. And then she has written, "REASON: COMPUTER DIFFICULTIES."
And have we already talked about that's the interfacing between the computer equipment that's part of the analysis machine interfacing with the lab computer?
A. Yes.
Q. Did she give you any more details, as far as her recollection of what happened, or what she did?
A. No. No. That's it. And I asked her, you know, is this corrected result a true result? And she assured me it was.
Q. The .19?
A. That's correct.
Q. And down here is the -- it says, "ENT." I'm assuming, you correct me if I'm wrong, that's when she would have entered her edit; is that correct, or what does that mean?
A. Let's see. That's -- I would assume that's the time at which the results above were edited.
Q. Okay. What does this, "Method: RXLB," mean?

A. That refers to the instrument. That's an abbreviation for the name on the instrument.
Q. The computer analysis equipment that we use to analyze the blood serum?
A. Yeah. That's the automated chemistry equipment.
Q. Is that the same as the automated analyzer?
A. That's correct.
Q. And then down here is another entry, "10/05-0544." What does that stand for, "Autodft"?
A. I can't answer that. I'd have to have it looked up and explained. These are things that are part of the print out that leave -- that sort of are data points for an operation. But what the abbreviation is, I would have to check with the people in information technology, or the individual in the laboratory responsible.
Usually these things are -- you know, they're printed on the reports, but they are not the actual value. So I can't comment on that. But the information as to exactly what that abbreviation refers to is available.
Q. So, again, if we wanted more information on that we need to talk to your computer information systems person?

A. Yes.
Q. Who is that person?
A. Well, see, there's a group there, and then the person in the lab is Millie. I'm blocking on her last name.
Q. Nelly?
A. Millie.
Q. Millie, M-I-L-L-I-E?
A. Yes.
Q. What about under here, there's a method, and then it says, "RXLA"?
A. That's the abbreviation for the automated chemistry equipment.
Q. What's the difference between the RXLB and the RXLA? Do you have two different --
A. We have two different ones. And that particular part of the record -- I can't accurately answer that. I could obtain the information, but that's part of the equipment record.
Q. Do we know if this particular blood specimen was run more than once through the automated analyzer?
A. I -- you know, from this, I don't know, you know.
Q. Well, was Kathy Higgins able to tell you whether or not it had been run twice?

A. No.
Q. And again, these issues were raised, and you did some investigation to try to find out what had happened with this blood specimen; correct?
A. That's correct.
Q. And you wrote a letter to us on November 1, '06 explaining, in part, on what your investigation concluded.
I need to know, what exactly did you do as part of your investigation? We know you talked to Kathy Higgins. I'm assuming that was part of your investigation?
A. That was a part of the initial investigation.
Q. Did you talk to any of the computer information people, like Millie?
A. No, not at that time.
Q. Have you talked to her since then?
A. Yes.
Q. In your letter you say a result was hand entered. What exactly does that mean?
A. She recalled the problems with the transfer of information at that time. And what she related to me was, that the information system had an update on it, and if you allowed it to complete a calculation, it would do the calculation twice. It was a quirk of the

programming. And because they had identified that, they modified the operation so the calculation was done by the technician running the instrument. The error -- the software error has been corrected.
Q. Let me see if I understand what you've just told me, because I'm not sure if I do. So let me go back through it.
A. Let's go through it. Review it.
Q. So what calculation was involved?
A. The transfer of -- let's see. In terms of milligrams per volume, from that into a percent.
Q. So on my Document No. 2, and your Document No. 7, we have a .19 result.
In your letter you indicate that actually means milligrams per --
A. Deciliter.
Q. Deciliter?
A. Yes.
Q. This document, however, does not -- Document No. 2 does not reflect that the .19 is a milligram per deciliter; correct?
A. It does not give results.
(Cell phone interruption.)
Q. (BY MS. BRIZEE) So explain to me, again, the calculation. Apparently, there was a software error and

a calculation was performed twice due to that error; correct?
A. That's correct.
Q. And it was the calculation -- tell me, again.
A. It was the fact that the calculation was done twice, that it was opted to have it done manually by the operating technician.
Q. Do you mean done twice, as in, it just did the calculation twice, and you got the result twice?
A. You got the result times two. It would -- there was a multiplier in it that gave an incorrect result.
Q. So it's not that it took whatever it was supposed to take, did its calculation, and gave you a result, and then redid the same thing; it was that it did the calculation, gave you a result, and then did the same calculation to the result?
A. Yes.
Q. So the result that you got was inaccurate?
A. Yes. So that was bypassed until it could be corrected.
Q. So then this calculation would be done by the lab tech?
A. That's correct.
Q. So tell me, again, what the calculation is,

because that's where I lost you.
A. The calculation is to change -- this is milligrams per deciliter -- into a percent.
Q. And when we look at documents, and we see .19, we look at that and say, that is the blood alcohol level for Ted Cox?
A. That would be a reasonable conclusion, but the units are not stated.
Q. Well, they are not stated. So how, on -- if we pulled some lab report out today, and we had a blood alcohol level, would the units be stated on the lab report?
A. Yes.
Q. How would they be stated?
A. In -- with a percent figure. As -- if you look for the reference range, you know, one column over it says reference.
Here, this is result. This is reference (indicating).
Q. I'm tracking with you.
A. And the reference is not that it's normal, but it has been referenced to the legal limit.
Q. So that reference percentage, you're telling us today, is his blood alcohol level?
A. The reference, no. That is the range. You

know, there is no normal value for alcohol. The alcohol -- if you analyze a blood specimen, and you can get an alcohol level, that reflects the fact that it has been ingested. And the reference range that's listed is to the legal limit.
Q. And that's what I was going to do. Let's use the legal limit as our reference tool so I can understand.
My understanding is, the laws of the State of Idaho say the legal limit is .08. I don't know what the tag line is after the .08. Is it milligrams per deciliter?
A. It's percent.
Q. Percent? Okay.
So is it possible this .19 result is .19 percent?
A. Now, how do you want this answered, because this is -- you know, one way or the other, you're going to get the interpretation I had when I interviewed Kathy Higgins. She said that was correct.
Q. That his blood alcohol level was .19 percent?
A. Yes. And in preparation for this deposition, I had everything -- you know, I had everything investigated that we had any record on. And then Millie, who does the computer work, and works in

chemistry, told me that this probably was a situation where the calculation was not done. Now, I'm looking at this -- you know, I'm getting conflicting information.
Q. That's okay. We're not here to ask you to answer our questions one way or the other. We're trying to find out what actually happened, because these issues have been raised. So let me go back.
When you talked to Kathy Higgins, then, she told you the .19 result is .19 percent? In her opinion, that is an accurate result; correct?
A. When I talked with her, that's what she relayed to me, was, this was -- then it represents a blood alcohol that's out of the range that's listed. It's into the illegal range, if you will.
And when I initially was reflecting this with the phone calls, that was my information. And the fact -- I think I related to both parties in this, in terms of the counsel, the document had some problems with it, because there was a reflection of a correction in it, which tells you, you know, that -- what was being corrected, what was wrong, is this a reliable result?
And with the information I had at that time, you know, I think -- I informed at least one of the counsels that I've considered it a medically reliable result. That it was not -- it had no value as a legal

alcohol for criminal purposes. And, you know, because we do not subscribe -- we are not a forensic laboratory. And that's the issue here.

Q. Well, let me stop right there, and then let's go back to this.

But the fact that you don't have forensic by your name, does that mean that all of your lab results, day in and day out, are inaccurate?

A. No.

Q. I mean, day in and day out, isn't your opinion that your lab results are accurate?

A. That's correct. It is my opinion that they are.

Q. And as far as reporting to a physician, for patient care purposes, this is something -- this .19 is something, would it not, that would be reported to a patient's physician and represented to be accurate?

A. That's correct.

Q. So the issue with forensic -- and we're kind of in the middle, because you talked about, medically it's accurate. For criminal purposes, it's not. We're not either. We're in the middle in a civil case.

A. I understand.

Q. But I understand that you're not a forensic lab. But let me ask you this: As far as a hospital lab

versus a forensic lab, what's the difference?

A. The forensic lab has a chain of evidence on collection, all the way from the individual who collected it, through every step of the way -- any time there was a change of hands. There's an accession into the forensic laboratory with signatures, dating, and so on.

And then there was a chain of custody, in terms of who operated -- who handled the specimen, who ran it, and a check on the results, so that, you know -- the possibility of people making mistakes along the way because it was handed off to different individuals, it could have been mixed up, something could have gone wrong.

So you could -- you have a more reasonable assurance that the results are related to the specimen that was originally drawn. You know, this is the criminal accuracy that's required. And that's under the designation of forensic lab.

Q. But let me ask you this question, because we've kind of veered into chain of custody: This specimen came in with a name, a date, and the initials of the individual drawing the specimen; correct?

In order for it to be accepted by the lab, I believe you said it had to have these three --

A. No. These -- I'm referring to the usual medical specimen. Now, we have, in a situation -- we're offering a service to the coroner's office, and the system will not allow them, as non-physician's, you know, ordering tests. So, you know, to handle this, I agreed to have my name put as the ordering physician any time they wanted to use this avenue.

They use it in terms of collaring information on coroner's cases to assist them in determining the cause of death. They've recognized these values -- laboratory results as having limited value or no value in a legal setting, but it's often useful value in determining the cause of death or understanding the circumstances around that.

Q. Let me ask you this question: In your investigation, did you find any indication that the blood that was analyzed and reported as Ted Cox's blood sample was not from Ted Cox?

A. I have no indication that it was not from Ted Cox.

Q. In your statement in this letter, it says the calculation -- you say the .19 is milligrams per deciliter. What is that statement based on, if Kathy Higgins is telling you it's .19 percent?

A. Okay. That's based on the subsequent, you

know, investigation that was done by Millie, who's the chief of chemistry and also runs the information system. This was her recollection, because she remembered the information on the error, the glitch, and the fact that it was corrected.

Q. So is Millie the same as Amelia Rennaux?

A. Yes. That's her.

Q. So she told you she had a specific recollection of Ted Cox's blood analysis?

A. No. She had a specific recollection of the computer problem, not specifically the -- it's the problem -- she had recollection of the problems related to the blood alcohols and the software glitch, as they would apply to Ted Cox's specimen.

As to specific reference -- you know, remembering that particular specimen, no. That statement may be worded so that could be interpreted, but the thing is, that, you know, she remembers that, you know, around that time there was one of those updates, and that this problem came out of it. That is why they had the individual tech during the transition period put in the correction.

Q. And that is how I read Millie's statement. I mean, her statement says that the alcohol testing performed back in '03 was hand entered as .19 MGDL.

So that's partly why I asked you at the beginning: Okay. Where is that hand entry? Where is that documentation?

A. The hand entry is in terms of the calculation -- is the calculation with respect to the -- what you can do at the interface. That's manual -- you know, they had to perform that multiplication manually. Basically, it's moving the decimal points.

Q. So her statement is just generally saying, if there was a problem with this specimen, here's, generally, what was going on at this time, and this could have happened with this specimen?

A. That's -- yeah. Her investigation was to give me a more in depth explanation of why that original result had this phrase, previously reported as, or there was a correction.

Q. But from your conversations with Millie, she does not have a specific recollection of what happened with Ted Cox's blood sample?

A. Not as a specific Ted Cox's specimen. It was, you know, in reference to the date it was done, and the problems that she recalled that were in this area.

Q. Because she has in here a conclusion the calculation was not performed. But from what you're telling me then, she doesn't really know that?

A. Well, that's her conclusion, that it was not performed, and that made the .19 -- it was -- you know, as she related the information to me, she said the .19 was not -- didn't have the multiplication by 100 to make it a percent. And so she said that her opinion was that the calculation was not performed. And that it was basically --

At that point, I just about lost it, because, you know, this is -- so I just told her to repeat the results or get me another specimen. That, you know, I'm not -- as director here, I am not going to have any record like this where we have a series of corrections.

To me, as director, you know -- in -- the reports had gotten into a situation where, from my standpoint, and from being responsible for their accuracy, I simply had to say, no, I'm not -- you've got two corrections in this situation, and as far as I'm concerned, nothing of either of these results is worth anything, from my judgment standpoint.

And, you know, I told her, I want it repeated. Well, we don't have the specimen. So, you know, if I'm going to say one of these or the other is medically interpretable -- at that point, no, they're no longer, because not only was the document questionable initially because there was a correction, now there's a second

layer of collection. That's totally unacceptable.

There is no -- you know, so at this point -- I mean, all I have to say is, this has no value. And, you know, it was like --

Q. But let me ask you this question: But Kathy Higgins has told you that she did do the calculation. So if you --

A. She told me it was a correct result. I can't -- you know, in terms of the calculation, I can't address that particular part. She told me that this accepted result reflected the blood alcohol.

Q. So now, unless I'm misinterpreting, and if I am, then you tell me, but what I'm hearing you say is, Kathy Higgins, the lab tech who performed this test, is saying the .19 result is the percentage?

A. That is how I interpreted her reassurance, you know. And that is why, you know, I did make statements, is that this was a medically reliable result.

Q. So if you believe Kathy Higgins, it's a medically reliable result?

A. If, you know -- if we're at that point, yes.

Q. Have you gone back and talked to Kathy Higgins again?

A. No, I have not.

Q. And if I'm hearing you correctly, Millie,

Amelia Rennaux, wrote this document based on her assumptions that the calculation was not done. She has no personal knowledge as to whether or not Kathy Higgins did or did not do the calculation; is that correct?

A. That's correct.

Q. Let me ask you this: In order to get -- say we have a blood specimen that comes into the lab today. We get a result of .19 mg, milligrams per deciliter. How -- is that a result that you have seen come out of your computer analysis?

I mean, I don't know what that calculates out to be to a percentage.

A. No -- well, I think since this occurrence, that computer software glitch has been corrected. So, you know, you bring in a specimen now, it gets analyzed. That transformation from units gets done correctly. That part's been corrected.

Q. How -- what I'm trying to get at is: How sensitive is your equipment? I mean, .19 milligrams per deciliter, is your equipment sensitive enough to actually give you a report of .19 --

A. Repeatedly?

Q. -- milligrams per deciliter?

A. Yes. There will be a small plus or minus on that. But these instruments, their automated

measurements are accurate.
Q. And what do you mean, there would be a small plus or minus on that?
A. Well, when you go out to several decimal places beyond that, I'm referring to that part. But for the most part, the precision of these current generation of laboratory instruments are -- the numbers you have are significant numbers.
Q. Let me ask you this question: On the automated analyzer, you said a display will come up on the computer screen attached to the automated analyzer; correct?
A. Correct.
Q. And that's something that the lab tech can look at, and what will the lab tech see on that computer screen?
A. She'll --
Q. Will they see a milligram per deciliter, or will they see the percentage calculation?
A. They'll see the units, the milligrams per deciliter, or if they've been -- if they're reported on other units -- the units will be listed.
Q. If we needed to, do we have a way to go back into your computer information system and try to figure out what the editing was that was done by Kathy Higgins?

A. That's an interesting question.
Q. Do you still have the same computers?
A. Yes. I mean, I can't address that. I don't know how well the things inside the computer are tracked.
Q. And in order to figure out what, actually, Kathy Higgins meant by the things she put in here, we probably need to talk to Kathy Higgins?
A. Yes.
Q. I mean, is there some standard in the lab that if you have a .19 result, and underneath is ALC previously reported as 0.00 percent, that your .19 is actually your percentage?
I mean, is there any standard policies for charting and editing?
A. No. That particular thing is outside of standard policy to begin with, because there was a correction on there.
Q. If you have -- when you have this software glitch that basically did the calculation twice, was the result that you were getting 0.00 percent blood alcohol levels?
A. No. It would be -- let's see. I cannot address exactly which way it was being done. I think it was, it was going to give a great -- a much greater

number. But I don't know. I'm relying on somebody's information. And I -- you know, that particular point was, you know, was not something I was questioning.
I was -- when I was, you know, trying to get all the facts to make sure I had all the information, by involving Millie, it was to address the actual value of this information, because I had -- you know, I had a telephone conversation -- said that -- you know, with the conversation with Kathy Higgins, that I would consider it medically reliable.
Q. And again, if you believe Kathy Higgins' information to you, you still believe it would be medically reliable; correct?
A. Well, there has been the subsequent investigation to give a little better definition of what was corrected, because it was -- you know, that's a loose end there. That was, at that time, in talking -- I forget which one of you I talked to on the phone about this, but, you know, first of all, there was this discussion by me that, well, this is an impeachable result because it was corrected.
You know, that's -- you want to know why it was corrected, and what it was corrected from, and, you know, more details on that. And, you know, so this is why -- you know, I knew this was going to be coming up.

So when we got into affidavits, it was like, wait a minute. This is going to nail me down to something that I don't have, you know.
But I did, over the phone, relate, I think, the information that I thought this was medically reliable. And then in preparation for the deposition, I wanted to make sure I had everything covered. And what it got me to the point was -- you know, I was a bit furious at the laboratory people for, you know, this thing. I just -- you know, this is, to me -- I'm just still furious. This sort of thing is intolerable. And it just happens to be on something that is now in civil litigation.
Q. Who would we talk to if we wanted to know what this software error did, this double calculation? Would that be Millie?
A. Millie, that's correct.
MS. BRIZEE: I believe those are all the questions I have for you, Doctor.
Mr. Helfrich may have some, and I may have some follow up, but thank you for your time.
MR. HELFRICH: Could we get these two pages marked, please?
MS. BRIZEE: I already have them marked, I think.
MR. HELFRICH: Are they?

MS. BRIZEE: Hang on. Those two?
MR. HELFRICH: Yeah.
MS. BRIZEE: Yours just looks a little bit -- you just have a received stamp. I don't know what this is.
MR. HELFRICH: Dr. Donndelinger, I just have a few questions for you.

EXAMINATION
BY MR. HELFRICH:
Q. First of all, as you sit here today as the director of laboratories for Mercy Medical Center, do you consider the results of the test on Ted Cox's blood alcohol sample to be medically reliable?
A. No.
Q. And the two pages that I put in front of you are your letter to defense counsel -- I don't have the numbers. Could you tell me what those are?
A. Exhibits 5 and 6.
Q. So Exhibits 5 and 6 are your letter to defense counsel and some notes that came from your chemistry coordinator, the woman you've referred to as Millie?
A. Yes.
Q. And does that letter reflect your conclusions as of today from investigating what occurred with respect to this particular blood alcohol report?

A. It is my understanding -- this is sort of like -- yes, it's an explanation, but, you know, the circumstances in this, and this record of events with a correction, and then a re-correction, you know, I just -- I -- this sort of train of information on a laboratory result is abominable, and I find it -- you know, just, it's intolerable that this sort of thing can be done.
And, you know, this is -- so this is what I see as an explanation. But the fact that this is going through two stages of correction, I mean, this is -- I mean, *is it -- you know, is this medically reliable*, would I tell a physician to use it? No. You know, give me another specimen.
MR. HELFRICH: That's all the questions I have. Thank you.
MS. BRIZEE: Okay. I have some follow up, Doctor.

FURTHER EXAMINATION
BY MS. BRIZEE:
Q. But neither you nor Millie have any personal knowledge of what happened with this specimen; correct?
A. That's correct.
Q. We know we had some software issues; correct?
A. *Correct.*

Q. We don't know how those issues impacted what Kathy Higgins was doing; correct?
A. Correct.
Q. So I believe I asked you, and I just want to make sure, because I think I might have heard you go in a different direction: If you believe Kathy Higgins, then this is a medically reliable result; is it not?
A. With that information, to that level, I was -- you know, it was a situation -- it's not legally useful. But if there was a correction, and, you know, a physician asked me, at that point, with that information, I would say, yes, it is useful -- medically useful information. When I get subsequent information, you know -- that's, you know -- I'm getting to a level where, you know --
Q. But your subsequent information is Millie's --
A. That's correct.
Q. -- speculative conclusion of what could have happened. We really don't know what happened. Isn't it true that this could be an accurate result, this .19?
A. I could conclude to its accuracy with that level of information at that time, but in terms of its -- to me, you know, it just --
Q. Well, again --
A. I mean, that's why we're here. This -- you

know, we're doing this in deposition, and there may be more depositions. But the thing is, I made a statement defending that document with that level of information. And when I find out that there's more information that wasn't related to me, and I defended that document, I get -- you know, now -- you know, now I feel I can't defend it if you're giving me additional information that I didn't have at that time.
And the thing is, you know -- I find here that, you know -- to me, in my position -- I mean, I'm not irritated. You've got a problem. I understand that. *You're representing your clients. I find out* that, you know, this is -- this has gotten to a point where, you know, there's going to be changes made to make sure nothing like this ever happens again. It's not -- you know, I could have told a physician, yes, you use it.
Q. Well, and all the --
A. At that point -- and then, you know, the thing is, wait a minute. There's -- you know, the thing is, it just simply isn't that. You know, the thing is, there is a laboratory information system here that is not the best --
Q. Okay.
A. -- and it brings out in me the irritation with

that system. So...
Q. Take your irritation away for a second.
A. So it's like --
Q. All I want to know is: As we sit here today, you've talked to Kathy Higgins, and Kathy Higgins has told you the .19 is the blood alcohol percentage; correct?
A. That's correct.
Q. And that it is an accurate result; correct?
A. That's correct.
MS. BRIZEE: Okay. Those are all the questions I have.

FURTHER EXAMINATION
BY MR. HELFRICH:
Q. Doctor, just a follow up on that.
You said that you would medically defend it if that was the only information you had, but you got more information later?
A. That's correct.
Q. And you can't medically defend it now?
A. No.
MR. HELFRICH: Thank you. No further questions.
///
///

FURTHER EXAMINATION
BY MS. BRIZEE:
Q. What do you mean by medically defend it? I mean --
A. Well, just, you know, if a physician asked me, can I use this information? You know, the patient claims he wasn't drinking. He shouldn't be drinking. You know, should I send him on to therapy, something or other? You know, at one level it seems correct, but then if you find out there's more things -- and it's just not that -- it's not an additional piece of information. Now it's the fact that, okay, there was something else, and now we're engaging with a computer system that I'm irritated with, and, you know, we get, you know, to add in issues, you know.
I just -- the thing is, it boils down to the fact that, simply, at the point where I got the information from Kathy, it seemed as if, to the best of her recollection, I could rely on her judgment. And then the other things that start getting introduced into this scenario, are the possibility of at least two more errors.
Q. But we don't know if those two other errors occurred; correct?
A. That's correct.

Q. We're just speculating; correct?
A. Well, I'm assuming they happened, because I have to assume the worst in this case.
Q. Well, but if we assume the best, then it would be a medically reliable document; correct?
A. If I could rely on Kathy Higgins' information.
MS. BRIZEE: Okay. Those are all the questions I have.

FURTHER EXAMINATION
BY MR. HELFRICH:
Q. Are you prepared to do that today with the other information you have?
A. Do what?
Q. Rely on Kathy Higgins' information.
A. With the additional information?
Q. With the additional information.
A. I mean, I wouldn't even talk about this as information anymore.
Q. It's not reliable?
A. You know, it's -- well, it's just, you're looking at it from two steps. I'm looking at it from many steps. And they bring in, you know, things that I'm concerned about that are additional things that, you know, I just -- you know, it's just, I don't -- I won't

tolerate this sort of thing. And that's what, you know, I'm showing.
So at one point I could say something, and as a result of that --
Q. We're only talking about that --
A. -- you guys are here.
Q. We're only talking about today.
With all the information you have today, are you prepared to defend it medically today, based on all you know?
A. No.

FURTHER EXAMINATION
BY MS. BRIZEE:
Q. Well, and my final question is: Are you prepared today to take and discard everything Kathy Higgins says, and tell us that this is 100 percent an inaccurate finding?
A. I'm simply saying, from the initial point of getting information from the report that there was a correction from her that she, you know, said was reliable, and then we find a series of other things, you know, the thing is, I don't --
Q. I mean, do you know?
A. I just think -- you know, the thing is, you

know, I can't -- you know, if we put the whole thing together, it's just, this whole thing is worthless.

Q. Well --

A. If we can rely on Kathy Higgins, yes. If we have to put in somebody else's information, and we find out there's flawed software, and then there's a question about somebody who forgot to do it, that's two more errors. And then, you know, this gets into --

Q. Well, but we don't know that she forgot to do it. I mean, from what she told you, she did do it.

A. Well, sort of. At this point, you know --

Q. We won't know until we talk to Kathy Higgins?

A. From my standpoint, taking all these things into account -- I mean, this is abomination. You know, it's just like, none of this is worth anything. And, you know, I want to take steps to make sure that something like this can never occur again.

And, you know, we just -- you know, you see I made reference to -- you know, the thing is, you know, we did this work for the coroner. We're not going to do anything that in any way can allow for mistakes to be incorporated into a report.

Q. But you can't sit here today and tell us that you know Kathy Higgins made a mistake?

A. No. I can't be certain of anything.

MS. BRIZEE: Okay. Those are all the questions I have.

(The deposition was concluded at 2:45 p.m.)

(Signature requested.)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
County of Ada)

I, ANDREA L. CHANDLER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 14th day of November, 2006.

ANDREA L. CHANDLER
RPR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 7-20-10

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
County of Ada)

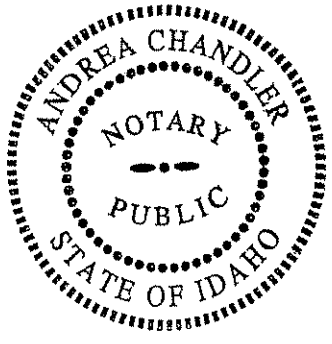
I, ANDREA L. CHANDLER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 14th day of November, 2006.



Andrea Chandler
ANDREA L. CHANDLER
RPR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 7-20-10

000266

000271

COPY

Steven K. Tolman (ISB #1769)
Jennifer Kauth Brizee (ISB #5070)
TOLMAN, BRIZEE & MARTENS, P.C.
132 3rd Avenue East
Post Office Box 1276
Twin Falls, Idaho 83303-1276
Telephone: (208) 733-5566

Attorney for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

* * * * * * * *

MARY KATHRYN SORENSEN and PATRICIA COX, Plaintiffs, vs. SHANE EDWARD McKAY, DAVID McKAY and VIVIAN McKAY, Defendants.	Case No. CV 04-10959 **NOTICE OF TAKING DEPOSITION DUCES TECUM OF THOMAS M. DONNDELINGER, M.D.**

* * * * * * * *

TO: Thomas M. Donndelinger, M.D.
Mercy Medical Center
1512 12th Avenue Rd.
Nampa, ID 83686

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that defendants will take the deposition upon oral examination of THOMAS M. DONNDELINGER, M.D., before a qualified Court Reporter, on Tuesday, the 7th day of November, 2006, at

the hour of 1:00 o'clock p.m., and continuing thereafter from day to day until such time as the taking of the deposition may be adjourned, at the Mercy Medical Center, 1512 12th Avenue Rd., Nampa, Idaho 83686, pursuant to Rule 30(a) of the Idaho Rules of Civil Procedure.

Said deponent is required to bring with him the originals plus one copy of the following:

Any and all documents concerning Ted Cox, Mary Kathryn Sorensen, and/or the subject matter of this litigation. The term "document" means and includes any and all records, notes, reports, consultations, invoices, analyses, charts, or any other document relative to this matter provided to or received by you, whether or not generated by you, contained within your file or in your possession, as well as all documents relied upon, referred to or consulted by you in rendering your opinions in this matter or generated by you. The term "document" also means and includes any kind of written, typewritten, or printed material whatsoever, including, but not limited to, papers, agreements, notes, memoranda, correspondence, letters, telegrams, statements, books, reports, studies, minutes, records, analyses, surveys, transcriptions, and recordings of which you have any knowledge or information, whether in your possession or control or not, relating to or pertaining in any way to the instant subject matter, and includes, but without limitation, originals, all file copies, and all other copies, no matter how or by whom prepared, and all drafts prepared in connection with such writing, whether used or not.

DATED this 30th day of October, 2006.

TOLMAN, BRIZEE & MARTENS, P.C.

BY: _____ For:
JENNIFER KAUTH BRIZEE

CERTIFICATE OF DELIVERY

I hereby certify that on this 20th day of October, 2006, I delivered a true and correct copy of the foregoing NOTICE OF TAKING DEPOSITION DUCES TECUM OF THOMAS M. DONNDELINGER, M.D., by facsimile transmission and depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Thomas M. Donndelinger, M.D.
Mercy Medical Center
1512 12th Avenue Rd.,
Nampa, ID 83686
(208) 463-5070

Tim J. Helfrich
YTURRI ROSE
P.O. Box 450
Fruitland, ID 83619
(541) 889-2432

Associated Reporting, Inc
1618 W. Jefferson St.
Boise, ID 83702
(208) 343-4002

FOR:
JENNIFER KAUTH BRIZEE

RUN DATE: 08/30/06 MERCY MEDICAL CENTER - NAMPA LAB**LIVE** PAGE 1
RUN TIME: 0944 LAB SPECIMEN INTERNAL INQUIRY
RUN USER: LAB.CMILLE

PATIENT: COX,TED ACCT #: N01195784 LOC: LAB M #: M0271432
AGE/SEX: 50/M ROOM: REG: 10/05/03
REQ DR: Donndelinger,Thomas MD DOB: 06/02/53 BED: DIS:
STATUS: REG REF TLOC:

SPEC#: 1005:CH00026U ORD FOR: 10/05/03-0542 STATUS: COMP REQ #: 00137633
COLL: 10/05/03-0542 SUBM DR: Donndelinger,Thomas MD
RECV: 10/05/03-0542 PT AGE AT COLL: 50

PT ID: ATT DR: CLIENT PHONE: (208)463-5271

ENTERED: 10/05/03-0544 ENT BY: LAB.KHIGGI OTHR DR:
COLL BY: RCV BY: LAB.KHIGGI
LAST RPTD: 10/30/04-1942 WKLD FN:
LAST ACT: 10/05/03-0548 BAR CD#: 127050

REVIEWED: 10/06/03-0739 LAB.ARE
ORDERED: ALCOHOL PANEL
QUERIES: SOURCE: BLOOD
COL CATEG:
ORD SITE: MMC TRANSIT SITE:
RCV SITE: MMC

PERFORM SITE	POINT OF TESTING RCV DEPT	DATE-TIME	USR	AT SITE
MMC				MMC

RPT AUDIT: 10/05/03 0545 .BROADCAST
10/05/03 0545 .BROADCAST
10/05/03 0547 .BROADCAST
10/05/03 0548 .BROADCAST
10/06/03 0500 MMCMRF

Test	Result	Flag	Reference
ALCOHOL PANEL			
ALCOHOL,ETHYL			0.00-0.07 %
	10/05/03-0546:		
	.19 RESULT		
	ALC previously reported as: 0.00 %		
	@ Edited by: Higgins,Kathy		
	@ Reason: COMPUTER DISCREPANCIES		
	Ent: 10/05-0547 LAB.KHIGGI; Ver: 10/05-0548 LAB.KHIGGI		
	Method: RXDH		
ETHANOL SOURCE	BLOOD		
	Ent: 10/05-0544 AUTODFT; Ver: 10/05-0544 AUTODFT		
	Method: RXLA		

Verified Result History

Edited Test	Result	Entered	Verified
ALC	0.00	10/05-0544 LAB.KHIGGI	10/05-0544 LAB.KHIGGI
	0.00	10/05-0547 LAB.KHIGGI	10/05-0547 LAB.KHIGGI
	10/05/03-0536:		
	ALC previously reported as: 0.00 %		
	@ Edited by: Higgins,Kathy		

Continued on next page ...

EX. NO. P
Thomas Donndelinger
DATE 11-16-06
ASSOCIATE
P

RUN DATE: 08/30/06 MERCY MEDICAL CENTER - NAMPA LAB**LIVE** PAGE 2
RUN TIME: 0944 LAB SPECIMEN INTERNAL INQUIRY
RUN USER: LAB.CMILLE

SPEC#: 1005-CH000265U PATIENT: COX,TED ACCT #: N01195744Z

Verified Result History

Edited Test	Result	Entered	Verified
	@ Reason: COMPUTER DIFFICULTIES	10/05-0547 LAB.KHIGGI	10/05-0548 LAB.KHIGGI
	10/05/06 0544		
	.19 RESULT		
	PLC previously reported as: 0.00 %		
	@ Edited by: Higgins,Kathy		
	@ Reason: COMPUTER DIFFICULTIES		

*** End of Report ***

RUN DATE: 10/06/03
RUN TIME: 0830

Mercy Medical Center - Nampa
1512 12th Avenue Road
Nampa, ID 83686
Dr. Donndelinger
Dr. Kronz

PAGE 1

Doctor Report

PHYSICIAN

Name: CDX,TED Age/Sex: 50/M Attend Dr: Donndelinger,Thomas ML
Acct#: N01195742 Unit#: MD271433 DOB: 08/02/53 Location: LAB
Reg: 10/05/03 Disch: Status: REQ REF

Specimen: 1005:CH00027U COMP Collected: 10/05/03-0542 Received: 10/05/03-0542

Test	Normal	Abnormal	Flag	Reference
******SPECIAL CHEMISTRY******				
DRUGS OF ABUSE SCREEN				
AMPHETAMINES	NEGATIVE			NEGATIVE
BARBITURATES	NEGATIVE			NEGATIVE
BENZODIAZEPINES	NEGATIVE			NEGATIVE
COCAINE	NEGATIVE			NEGATIVE
THC50	NEGATIVE			NEGATIVE
OPIATE	NEGATIVE			NEGATIVE
PCP	NEGATIVE			NEGATIVE
DRUG SCREEN SOURCE	URINE			

POSITIVE SCREENING TEST RESULTS SHOULD BE REPEATED BY A CONFIRMATORY METHOD WHEN CLINICALLY INDICATED.

** END OF REPORT **

RUN DATE: 10/06/03
RUN TIME: 0830

Mercy Medical Center - Nampa
1512 12th Avenue Road
Nampa, ID 83686
Dr. Donndelinger
Dr. Kronz

PAGE 1

Doctor Report

PHYSICIAN

Name: COX,TED Age/Sex: 50/M Attend Dr: Donndelinger,Thomas MD
Acct#: N0319578A2 Unit#: M0271432 DOB: 06/02/53 Location: LAB
Reg: 10/05/03 Disch: Status: ENC REF

Specimen: 1005:CH00026U COMP Collected: 10/05/03-0542 Received: 10/05/03-0542

Test	Normal	Abnormal	Flag	Reference
***** SPECIAL CHEMISTRY *****				
ALCOHOL PANEL				
ALCOHOL,ETHYL				0.00-0.07 %
	10/05/03 0546: .19 RESULT ALC previously reported as: 0.00 %			
ETHANOL SOURCE	BLOOD			

** END OF REPORT **

EX. NO. 48
IDENTIFIED
DATE 11/7/06
ASSOCIATED REPORTING

DIAGNOSTIC PATHOLOGY SERVICES, INC.

Mercy Medical Center
1512 12th Avenue Road
Nampa, Idaho 83686
(208) 466-2661
Fax: (208) 463-5070

Thomas M. Donndelinger, M.D.
Joseph D Kronz, M.D.

November 1, 2006

Steven K. Toman
Jennifer K. Brizee
Tolman, Brizee & Martens, PC
132 3rd Avenue East
Post Office Box 1276
Twin Falls, Idaho 83303-1276

Re: Deposition scheduled at Mercy Medical Center on 11/7/06

In preparation for the deposition, an internal review by the Chemistry Coordinator was performed to try get as accurate detail as possible on the blood alcohol in dispute on Ted Cox.

The conclusion of this investigation is considered as accurate as possible considering the reconstruction necessary. The blood alcohol specimen was brought into the laboratory at Mercy Medical Center early in the morning. The test was run. The result was hand entered at 0.19 mg/dL. The calculation to change it to percent was not performed. Results of blood alcohol determinations are normally reported in a percentage, and if that calculation had been done, the result would have been 0.0%. It is noted on the report that these results "should not be used for non-medical purposes". A chain of custody is not maintained.

This testing was done as a community service for the coroners' office due to budget constraints. Enclosed is a copy of that summary. Because of the reinterpretation of the results, I feel the laboratory report has absolutely no informational value at this point. I could not recommend its use and no longer can interpret these results as either accurate or inaccurate.

We are discontinuing any community services for law enforcement or coroners' work in this laboratory.

Sincerely,

Thomas M. Donndelinger, M.D.
Pathologist

TMD:sf

Enclosure

Cc: Tim J. Helfrich
Yturri Rose
P. O. Box 450
Fruitland, Idaho 83619

It appears that due to a program update to the computer system, that the alcohol testing performed back in 2003 on Ted Cox was hand entered as 0.19 mg/dL. The calculation was not performed. We report out percentage and, therefore, the percentage would be 0.0%. These results should not be used for non-medical purposes. A chain of custody is not maintained on these specimens.

This was discussed with Bill at Canyon County Coroner's office on 10/31/06.

Amelia Renaux,
Chemistry Coordinator

PATIENT: COX,TED ACCT #: N011957842 LOC: LAB U #: M0271432
AGE/SX: 50/M ROOM: REG: 10/05/03
REG DR: Donndelinger,Thomas MD DOB: 06/02/53 BED: DIS:
STATUS: REG REF TLOC:

SPEC#: 1005:CH00026U ORD FOR: 10/05/03-0542 STATUS: COMP REQ #: 00137633
COLL: 10/05/03-0542 SUBM DR: Donndelinger,Thomas MD
RECV: 10/05/03-0542 PT AGE AT COLL: 50

PT ID: ATT DR: CLIENT PHONE: (208)463-5271

ENTERED: 10/05/03-0544 ENT BY: LAB.KHIGGI OTHR DR:
COLL BY: RCV BY: LAB.KHIGGI
LAST RPTD: 11/07/06-1310 WKLD FN:
LAST ACT: 10/05/03-0548 BAR CD#: 127050

REVIEWED: 10/06/03-0739 LAB.ARE
ORDERED: ALCOHOL PANEL
QUERIES: SOURCE: BLOOD
COL CATEG:
ORD SITE: MMC TRANSIT SITE:
RCV SITE: MMC

POINT OF TESTING

PERFORM SITE	RCV DEPT	DATE-TIME	USR	AT SITE
MMC				MMC

RPT AUDIT: 10/05/03 0545 .BROADCAST
10/05/03 0545 .BROADCAST
10/05/03 0547 .BROADCAST
10/05/03 0548 .BROADCAST
10/06/03 0500 MMCMRF
10/31/06 1053 MMCSUM LAB

Test	Result	Flag	Reference
ALCOHOL PANEL			
ALCOHOL,ETHYL			*0.00-0.07 %*
	10/05/03 0546:		
	.19 RESULT		
	ALC previously reported as: 0.00 %		
	@ Edited by: Higgins,Kathy		
	@ Reason: COMPUTER DIFFICULTIES		
	Ent:*10/05-0547 LAB.KHIGGI*, Ver: *10/05-0548 LAB.KHIGGI*		
	Method: *RXLB*		
ETHANOL SOURCE	BLOOD		
	Ent:*10/05-0544 AutoDft*, Ver: *10/05-0544 AutoDft*		
	Method: RXLA		

Continued on next page ...

EX. NO. 7
Thomas Donndelinger
DATE 11/7/06
ASSOCIATED COURT REPORTING INC

SPEC#: 1005:CH00026U PATIENT: COX,TED ACCT #: N011957842

Test	Result	Flag	Reference

—— Verified Result History ——

Edited Test	Result	Entered	Verified
ALC	0.00	10/05-0544 LAB.KHIGGI	10/05-0544 LAB.KHIGGI
	0.00	10/05-0547 LAB.KHIGGI	10/05-0547 LAB.KHIGGI
	10/05/03 0546:		
	ALC previously reported as: 0.00 %		
	@ Edited by: Higgins,Kathy		
	@ Reason: COMPUTER DIFFICULITIES		
		10/05-0547 LAB.KHIGGI	10/05-0548 LAB.KHIGGI
	10/05/03 0546:		
	19 RESULT		
	ALC previously reported as: 0.00 %		
	@ Edited by: Higgins,Kathy		
	@ Reason: COMPUTER DIFFICULITIES		

*** End of Report ***

Dennis Benjamin
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorney for Petitioner

IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE McKAY, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV 07-728C **NOTICE OF APPEAL**

ORIGINAL

COMES NOW, Shane McKay, and hereby files his Notice of Appeal. As required by IAR 17, Mr. McKay states:

1) He appeals from the District Court's order denying Mr. McKay's motion for summary disposition and the order granting the State's motion for summary disposition.

2) The issue on appeal is whether petitioner received the effective assistance of counsel during his criminal case.

3) This Court has jurisdiction under IAR 11(a)(1).

4) The transcript from the May 21, 2007, motion hearing has been requested.

5) The following documents, in addition to those automatically included in the clerk's record, should be included:

- Verified Petition for Post-Conviction Relief
- Memorandum in Support of Verified Petition for Post-Conviction Relief
- State's Answer
- State's Motion for Summary Disposition
- Petitioner's Motion for Permission to Conduct Discovery
- Petitioner's Request that the Court Take Judicial Notice
- State's Objection to Motion for Permission to Conduct Discovery
- Petitioner's Cross-Motion for Summary Disposition
- Memorandum in Response to State's Motion for Summary Disposition and in Support of Cross Motion for Summary Judgment
- Notice of Filing of Exhibits
- Motion for Relief from Judgment

6) The court reporter has been served with this notice of appeal.

7) The estimated fee for the preparation of the clerk's record and transcript has not been paid because petitioner is requesting that he be permitted to proceed in forma pauperis.

8) Counsel certifies that he has served all persons required to be served by Rule 20.

DATED THIS 1ST day of June 2007.

Dennis Benjamin
Attorney for Shane McKay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June 2007, I caused a true and correct copy of the foregoing document to be

X mailed, by U.S. Mail postage pre-paid

___ hand delivered

___ faxed

to: Gearld Wolff
Deputy Prosecuting Attorney
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

Carole Walden
Court Reporter
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

Dennis Benjamin

Dennis Benjamin
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
(208) 345-8274 (f)

Attorney for Petitioner

IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE McKAY, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV 0700728C **MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS AND TO APPOINT STATE APPELLATE PUBLIC DEFENDER** ORIGINAL

COMES NOW, Shane McKay, and asks this Court to permit him to proceed on appeal in forma pauperis and to appoint the State Appellate Public Defender to represent him on his appeal from the order denying post-conviction relief. Mr. McKay's parents have been paying the legal fees associated with the case thus far but the retainer has been depleted and they are not able to continue to pay.

The Court previously appointed Mr. McKay the services of SAPD on direct appeal from his criminal conviction. His financial situation has not changed since then. A true and correct copy of Mr. McKay's Idaho Department of Correction Trust Fund Statement, which shows a

balance of $474.15, is attached hereto.

DATED THIS 1st day of June 2007.

Dennis Benjamin
Attorney for Shane McKay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1ST day of June 2007, I caused a true and correct copy of the foregoing document to be

X mailed, by U.S. Mail postage pre-paid

___ hand delivered

___ faxed

to: Gearld Wolff
Deputy Prosecuting Attorney
Canyon Co. Courthouse.
1115 Albany
Caldwell, ID 83605

Dennis Benjamin

MAY 3 1 2007

OFFSTMT S T A T E O F I D A H O DATE: 05/16/2007
DEPARTMENT OF CORRECTIONS TIME: 16:29:51
TRUST FUND STATEMENT

Doc No: 76318 Name: MCKAY, SHANE SAWC/GHSG PRES FACIL
TIER-C CELL-1
Transaction Dates: 04/13/2007-05/16/2007 Checking Status: ACTIVE
Savings Status: ACTIVE

CHECKING:

Beginning Balance	Total Charges	Total Payments	Current Balance
95.56	313.91	274.82	56.47

SAVINGS:

Beginning Balance	Total Charges	Total Payments	Current Balance
416.06	0.00	1.62	417.68

== CHECKING TRANSACTIONS ==

Date	Batch	Description	Ref Doc	Amount	Balance
04/16/2007	SA0371587-214	099-COMM SPL		59.32DB	36.24
04/23/2007	SA0372359-226	099-COMM SPL		32.17DB	4.07
04/25/2007	HQ0372543-017	011-RCPT MO/CC	MAIL	150.00	154.07
04/25/2007	SA0372592-011	070-PHOTO COPY	33373	0.10DB	153.97
04/30/2007	SA0373102-185	099-COMM SPL		59.82DB	94.15
04/30/2007	SA0373102-186	099-COMM SPL		16.96DB	77.19
04/30/2007	HQ0373143-263	335- 3/2007 INTERE	INTEREST	1.62	78.81
04/30/2007	HQ0373144-263	935- 3/2007 INTERE	INTEREST	1.62DB	77.19
05/07/2007	SA0373998-215	099-COMM SPL		59.86DB	17.33
05/07/2007	SA0374063-008	218-CACHE/CLERK	APR PAY	55.80	73.13
05/07/2007	HQ0374064-001	062-CHILD SUPP	189530	25.00DB	48.13
05/07/2007	SA0374075-013	218-ASHTON CITY	APR PAY	0.70	48.83
05/07/2007	SA0374079-008	218-DUBOIS CITY	APR PAY	17.10	65.93
05/07/2007	SA0374083-009	218-F&G TEX CREEK	APR PAY	49.60	115.53
05/14/2007	SA0374864-245	099-COMM SPL		59.06DB	56.47

== SAVINGS TRANSACTIONS ==

Date	Batch	Description	Ref Doc	Amount	Balance
04/30/2007	HQ0373145-263	035- 3/2007 INTERE	INTEREST	1.62	417.68

124

= IDOC TRUST ========== OFFENDER BANK BALANCES ========== 05/23/2007 =

Doc No: 76318 Name: MCKAY, SHANE
Account: CHK Status: ACTIVE

SAWC/GHSG PRES FACIL
TIER-C CELL-1

Transaction Dates: 12/01/2006-05/23/2007

Beginning Balance	Total Charges	Total Payments	Current Balance
205.98	1955.74	1754.81	5.05

TRANSACTIONS

Date	Batch	Description	Ref Doc	Amount	Balance
12/04/2006	HQ0356547-016	030-12/2006 CI INC	CI INCOME	63.66	269.64
12/04/2006	HQ0356548-008	061-CK INMATE	FAMILY SUP	8.52DB	261.12
12/04/2006	HQ0356549-013	062-CHILD SUPP	189530	25.00DB	236.12
12/04/2006	HQ0356550-008	078-MET MAIL	FAMILY SUP	0.39DB	235.73
12/04/2006	SA0356570-250	099-COMM SPL		73.16DB	162.57
12/07/2006	SA0357080-005	218-H&W ST HOSP. S	NOV PAY	9.00	171.57
12/07/2006	SA0357084-002	218-TNF IDAHO FALL	NOV PAY	4.20	175.77
12/11/2006	HQ0357348-012	030-12/2006 CI INC	CI INCOME	96.26	272.03
12/11/2006	HQ0357349-005	061-CK INMATE	FAMILY SUP	13.78DB	258.25
12/11/2006	HQ0357351-005	078-MET MAIL	FAMILY SUP	0.39DB	257.86
12/11/2006	HQ0357352-011	935-12/2006 CI TRA	CI TRANS	2.09DB	255.77
12/11/2006	SA0357391-186	099-COMM SPL		58.84DB	196.93
12/11/2006	SA0357451-015	070-PHOTO COPY	31620	0.40DB	196.53
12/11/2006	SA0357453-020	072-METER MAIL	31621	0.24DB	196.29
12/18/2006	SA0358219-247	099-COMM SPL		16.51DB	179.78
12/18/2006	HQ0358296-012	061-CK INMATE	31761	100.00DB	79.78
12/26/2006	SA0359085-248	099-COMM SPL		59.47DB	20.31
12/29/2006	HQ0359516-356	335-11/2006 INTERE	INTEREST	0.75	21.06
12/29/2006	HQ0359517-356	935-11/2006 INTERE	INTEREST	0.75DB	20.31
01/02/2007	SA0359590-217	099-COMM SPL		10.00DB	10.31
01/03/2007	HQ0359687-012	030- 1/2007 CI INC	CI INCOME	176.10	186.41
01/03/2007	HQ0359688-005	061-CK INMATE	FAMILY SUP	35.16DB	151.25
01/03/2007	HQ0359689-010	062-CHILD SUPP	189530	25.00DB	126.25
01/03/2007	HQ0359690-005	078-MET MAIL	FAMILY SUP	0.39DB	125.86
01/03/2007	HQ0359691-011	935- 1/2007 CI TRA	CI TRANS	35.55DB	90.31
01/08/2007	SA0360284-239	099-COMM SPL		39.37DB	50.94
01/10/2007	HQ0360657-002	011-RCPT MO/CC	MAIL	200.00	250.94
01/10/2007	SA0360659-040	072-METER MAIL	32247	0.24DB	250.70
01/10/2007	SA0360664-022	070-PHOTO COPY	32245	0.50DB	250.20
01/10/2007	HQ0360787-011	030- 1/2007 CI INC	CI INCOME	113.60	363.80
01/10/2007	HQ0360788-005	061-CK INMATE	FAMILY SUP	17.50DB	346.30
01/10/2007	HQ0360790-005	078-MET MAIL	FAMILY SUP	0.39DB	345.91
01/10/2007	HQ0360791-010	935- 1/2007 CI TRA	CI TRANS	15.71DB	330.20
01/15/2007	SA0361076-218	099-COMM SPL		53.80DB	276.40
01/22/2007	SA0361681-211	099-COMM SPL		51.64DB	224.76
01/23/2007	SA0361899-020	072-METER MAIL	32440	0.48DB	224.28
01/29/2007	SA0362534-238	099-COMM SPL		20.50DB	203.78
01/31/2007	HQ0362996-352	335-12/2006 INTERE	INTEREST	0.93	204.71
01/31/2007	HQ0362997-352	935-12/2006 INTERE	INTEREST	0.93DB	203.78

= IDOC TRUST ========== OFFENDER BANK BALANCES ========== 05/23/2007 =

Doc No: 76318 Name: MCKAY, SHANE
Account: CHK Status: ACTIVE

SAWC/GHSG PRES FACIL
TIER-C CELL-1

Transaction Dates: 12/01/2006-05/23/2007

Beginning Balance	Total Charges	Total Payments	Current Balance
205.98	1955.74	1754.81	5.05

TRANSACTIONS

Date	Batch	Description	Ref Doc	Amount	Balance
02/05/2007	SA0363333-235	099-COMM SPL		47.92DB	155.86
02/05/2007	SA0363333-236	099-COMM SPL		12.91DB	142.95
02/05/2007	SA0363376-009	218- FC PARKS & RE	JAN PAY	23.85	166.80
02/05/2007	HQ0363377-002	062-CHILD SUPP	189530	11.93DB	154.87
02/05/2007	SA0363382-008	218-ASHTON MEMORIA	JAN PAY	0.70	155.57
02/07/2007	HQ0363875-008	030- 2/2007 CI INC	CI INCOME	53.10	208.67
02/07/2007	HQ0363876-005	061-CK INMATE	FAMILY SUP	7.11DB	201.56
02/07/2007	HQ0363877-008	062-CHILD SUPP	189530	13.07DB	188.49
02/07/2007	HQ0363878-005	078-MET MAIL	FAMILY SUP	0.39DB	188.10
02/12/2007	SA0364357-243	099-COMM SPL		59.86DB	128.24
02/12/2007	SA0364357-244	099-COMM SPL		61.48DB	66.76
02/14/2007	HQ0364688-008	030- 2/2007 CI INC	CI INCOME	144.94	211.70
02/14/2007	HQ0364689-005	061-CK INMATE	FAMILY SUP	24.83DB	186.87
02/14/2007	HQ0364691-005	078-MET MAIL	FAMILY SUP	0.39DB	186.48
02/14/2007	HQ0364692-007	935- 2/2007 CI TRA	CI TRANS	39.72DB	146.76
02/20/2007	SA0365061-239	099-COMM SPL		58.90DB	87.86
02/26/2007	SA0365776-227	099-COMM SPL		59.79DB	28.07
02/28/2007	HQ0366184-345	335- 1/2007 INTERE	INTEREST	1.23	29.30
02/28/2007	HQ0366185-345	935- 1/2007 INTERE	INTEREST	1.23DB	28.07
03/02/2007	HQ0366531-006	030- 3/2007 CI INC	CI INCOME	178.03	206.10
03/02/2007	HQ0366532-004	061-CK INMATE	FAMILY SUP	35.33DB	170.77
03/02/2007	HQ0366533-007	062-CHILD SUPP	189530	25.00DB	145.77
03/02/2007	HQ0366534-004	078-MET MAIL	FAMILY SUP	0.39DB	145.38
03/02/2007	HQ0366535-005	935- 3/2007 CI TRA	CI TRANS	37.31DB	108.07
03/05/2007	SA0366701-235	099-COMM SPL		38.67DB	69.40
03/06/2007	SA0367040-035	071-MED CO-PAY	2/26/07	3.00DB	66.40
03/12/2007	SA0367599-246	099-COMM SPL		47.18DB	19.22
03/19/2007	SA0368340-218	099-COMM SPL		12.78DB	6.44
03/20/2007	SA0368488-007	071-MED CO-PAY	3/13/07	5.00DB	1.44
03/20/2007	HQ0368494-007	030- 3/2007 CI INC	CI INCOME	163.00	164.44
03/20/2007	HQ0368495-004	061-CK INMATE	FAMILY SUP	30.81DB	133.63
03/20/2007	HQ0368497-004	078-MET MAIL	FAMILY SUP	0.39DB	133.24
03/20/2007	HQ0368498-006	935- 3/2007 CI TRA	CI TRANS	51.80DB	81.44
03/26/2007	SA0369181-247	099-COMM SPL		33.74DB	47.70
03/30/2007	SA0369738-024	071-MED CO-PAY	03/26/07	7.00DB	40.70
03/30/2007	HQ0369823-342	335- 2/2007 INTERE	INTEREST	1.35	42.05
03/30/2007	HQ0369824-342	935- 2/2007 INTERE	INTEREST	1.35DB	40.70
04/02/2007	SA0369878-213	099-COMM SPL		37.16DB	3.54
04/03/2007	HQ0370094-007	030- 4/2007 CI INC	CI INCOME	175.64	179.18

= IDOC TRUST ========== OFFENDER BANK BALANCES ========== 05/23/2007 =

Doc No: 76318 Name: MCKAY, SHANE
Account: CHK Status: ACTIVE

SAWC/GHSG PRES FACIL
TIER-C CELL-1

Transaction Dates: 12/01/2006-05/23/2007

Beginning Balance	Total Charges	Total Payments	Current Balance
205.98	1955.74	1754.81	5.05

TRANSACTIONS

Date	Batch	Description	Ref Doc	Amount	Balance
04/03/2007	HQ0370095-004	061-CK INMATE	FAMILY SUP	34.48DB	144.70
04/03/2007	HQ0370096-008	062-CHILD SUPP	189530	25.00DB	119.70
04/03/2007	HQ0370097-004	078-MET MAIL	FAMILY SUP	0.39DB	119.31
04/03/2007	HQ0370098-006	935- 4/2007 CI TRA	CI TRANS	35.77DB	83.54
04/03/2007	SA0370112-001	317-CREDIT MED COP	FIX#369738	3.00	86.54
04/06/2007	SA0370716-007	218-DUBOIS CITY	MAR PAY	34.20	120.74
04/06/2007	SA0370720-007	218-F7W CAMAS CREE	MAR PAY	36.45	157.19
04/09/2007	SA0370817-236	099-COMM SPL		57.63DB	99.56
04/12/2007	SA0371346-040	071-MED CO-PAY	4/5/07	4.00DB	95.56
04/16/2007	SA0371587-214	099-COMM SPL		59.32DB	36.24
04/23/2007	SA0372359-226	099-COMM SPL		32.17DB	4.07
04/25/2007	HQ0372543-017	011-RCPT MO/CC	MAIL	150.00	154.07
04/25/2007	SA0372592-011	070-PHOTO COPY	33373	0.10DB	153.97
04/30/2007	SA0373102-185	099-COMM SPL		59.82DB	94.15
04/30/2007	SA0373102-186	099-COMM SPL		16.96DB	77.19
04/30/2007	HQ0373143-263	335- 3/2007 INTERE	INTEREST	1.62	78.81
04/30/2007	HQ0373144-263	935- 3/2007 INTERE	INTEREST	1.62DB	77.19
05/07/2007	SA0373998-215	099-COMM SPL		59.86DB	17.33
05/07/2007	SA0374063-008	218-CACHE/CLERK	APR PAY	55.80	73.13
05/07/2007	HQ0374064-001	062-CHILD SUPP	189530	25.00DB	48.13
05/07/2007	SA0374075-013	218-ASHTON CITY	APR PAY	0.70	48.83
05/07/2007	SA0374079-008	218-DUBOIS CITY	APR PAY	17.10	65.93
05/07/2007	SA0374083-009	218-F&G TEX CREEK	APR PAY	49.60	115.53
05/14/2007	SA0374864-245	099-COMM SPL		59.06DB	56.47
05/21/2007	SA0375764-234	099-COMM SPL		51.42DB	5.05

A= 20.47

B = 58.49

STATE OF IDAHO
Idaho Department of Correction
I hereby certify that the foregoing is a full, true, and correct copy of an instrument as the same now remains on file and of record in my office.
WITNESS my hand hereto affixed this 23rd day of May A.D., 2007

By Lorraine Borges

dt

DAVID L. YOUNG
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
1115 Albany
Caldwell, Idaho 83605

Telephone: (208) 454-7391

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE MCKAY,

Defendant/Petitioner,

vs.

THE STATE OF IDAHO,

Plaintiff/Respondent.

CASE NO. CV0700728

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION AND DENYING PETITIONER'S CROSS-MOTION FOR SUMMARY DISPOSITION

This case came before the Court on May 21, 2007, for hearing on Respondent's Motion for Summary Disposition under I.C. §19-4896(c) and on Petitioner's Cross-Motion for Summary Disposition. Petitioner was represented by Dennis Benjamin, Attorney at Law. Respondent was represented by GEARLD L. WOLFF, Deputy Prosecuting Attorney for Canyon County. Counsel for both parties presented oral argument to the Court based upon the prior pleadings, motions and exhibits submitted herein. After hearing the arguments of counsel, the Court placed its Findings of Facts and Conclusions of law on to the record, determining that there were no genuine issues of material fact, only issues as to how the legal issues were to be resolved.

Based upon the evidence/exhibits, pleadings and arguments, the Court concludes that Respondent's Motion for Summary Disposition should be granted, and Petitioner's Cross-Motion

should be denied under the standards applicable through Strickland v. Washington, 466 U.S. 668 (1984). The Court finds that Petitioner was benefitted, and not prejudiced, by the jury instructions given in the jury trial in CR0321789 and that trial counsel and appellate counsel were not constitutionally deficient in their performance.

THEREFORE, the Respondent's Motion for Summary Disposition is granted, judgment herein is granted to Respondent and the Petition herein is ordered DISMISSED. Petitioner's Cross-Motion is hereby DENIED.

JUN 01 2007

DATED This __ day of May, 2007.

RENAE J. HOFF
DISTRICT JUDGE

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer to Petition for Post Conviction Relief was mailed to Dennis Benjamin, P.O. Box 2772, Boise, Idaho 83702, counsel for Petitioner, on or about this 5 day of ~~January~~ June, 2007.

~~GEARLD L. WOLFF~~ T. Hill
~~Deputy Prosecuting Attorney~~ Deputy Clerk

IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE McKAY, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV 0700728C **ORDER GRANTING MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS AND TO APPOINT STATE APPELLATE PUBLIC DEFENDER**

THE COURT, having considered Shane McKay's motion to permit him to proceed on appeal in forma pauperis and to appoint the State Appellate Public Defender to represent him on his appeal, and good-cause appearing therefore, grants the motion and hereby Orders:

1) That the costs of proceeding on appeal, including the preparation of the clerk's record and transcript be prepared at public expense;

2) That the State Appellate Public Defender be and hereby is appointed to represent Mr. Kay on appeal.

JUN 11 2007

DATED THIS ____ day of June 2007.

Renae J. Hoff
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of June 2007, I caused a true and correct copy of the foregoing document to be

X mailed, by U.S. Mail postage pre-paid

___ hand delivered

___ faxed

to: Gearld Wolff
Deputy Prosecuting Attorney
Canyon Co. Courthouse.
1115 Albany — Court Basket
Caldwell, ID 83605

Dennis Benjamin
Nevin, Benjamin, McKay & Bartlett LLP
P.O. Box 2772
Boise, ID 83701

Molly Huskey
State Appellate Public Defender
3647 Lake Harbor Ln.
Boise, ID 83703

cc: Theresa Randall
Appeals Clerk

J Meyers

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE MCKAY,	)	
	)	
Petitioner-Appellant,	)	Case No. CV-07-00728*C
	)	
	)	CERTIFICATE OF EXHIBIT
-vs-	)	
	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the following is being sent as an exhibit:

Presentence Investigation Report (From Case #CR-03-21789*C)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 10 day of August, 2007.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: Heideman Deputy

CERTIFICATE OF EXHIBIT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE MCKAY,	)	
	)	
Petitioner-Appellant,	)	Case No. CV-07-00728*C
	)	
-vs-	)	CERTIFICATE OF CLERK
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record the above entitled cause was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules, including specific documents as requested in the Notice of Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 10 day of August, 2007.

WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Herdeman Deputy

CERTIFICATE OF CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SHANE MCKAY,	)	
	)	
Petitioner-Appellant,	)	Supreme Court No. 34271
	)	
	)	CERTIFICATE OF SERVICE
-vs-	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record to the attorney of record to each party as follows:

Molly Huskey, State Appellate Public Defender, 3647 Lake Harbor Lane, Boise, Idaho 83703

Lawrence G. Wasden, Attorney General, Statehouse, Boise, Idaho 83720

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 6 day of August, 2007.

WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Heideman Deputy

CERTIFICATE OF SERVICE